(26,358)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 891.

MACKAY TELEGRAPH & CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF LITTLE ROCK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Caption.*

Pleas Before Hon. G. W. Hendricks, Judge of the Third Division of the Pulaski Circuit Court, in the Case of City of Little Rock, Plaintiff, vs. Mackay Telegraph & Cable Company, Defendant, had on April 10, 1917. Action for License Fees on Telegraph Poles.

2 In the Pulaski Circuit Court.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH AND CABLE COMPANY, Defendant.

Complaint at Law.

Comes the plaintiff, City of Little Rock, by its attorney, James W. Mehaffy, and for cause of action against the defendant, states:

1. That the plaintiff is a municipal corporation organized and existing under and by virtue of the laws of the State of Arkansas.

2. That the defendant, Mackay Telegraph & Cable Company, is a corporation organized under the laws of the State of ——, and authorized to do a telegraph business in Arkansas.

3. That on March 11, 1912, the City Council passed ordinance No. 1791 granting to the defendant, Mackay Telegraph & Cable Company, a franchise to construct and maintain telegraph poles in the City of Little Rock, and that said ordinance was duly accepted by said defendant, Mackay Telegraph & Cable Company, and is a contract between the plaintiff and defendant. A copy of said ordinance is hereto attached, made a part hereof, and marked "Exhibit A."

4. That among other things, said ordinance provided the following:

"Section 3. That the company shall pay to the city immediately upon the completion of said lines, and on January 1st, of each
3 year thereafter, a license tax of fifty cents for each pole erected or set up, and a license or tax on all conduits constructed to an amount equal to four poles to each block. And said company shall comply with all ordinances hereafter passed in regard to the license or tax on poles, conduits or wires, either decreasing or increasing the same, that are general and applicable to all telegraph or telephone companies in said city. And said company agrees and consents to pay a license or tax on all its conduits displacing poles equally the license or tax that is or may be imposed on the poles replaced by said conduit by general ordinances applying to all telegraph or telephone companies."

5. That pursuant to the above mentioned ordinance the defendant, Mackay Telegraph & Cable Company, erected and has since main-

tained in the City of Little Rock 205 poles or equivalent thereto, and there is due the City of Little Rock as a license tax or fee for the said poles, the following amounts:

For the last half of year 1912	$51.25
" all of year 1913	102.50
" all of year 1914	102.50
" all of year 1915	102.50
" all of year 1916	102.50
Total amount due	$461.25

That the defendant has never paid anything to the plaintiff under the above ordinance and that there is now due the plaintiff from the defendant and unpaid, the sum of $461.25.

4 Wherefore, plaintiff prays judgment against the defendant for four hundred and sixty-one and 25/100 ($461.25) dollars and for interest and costs, and for all other and proper relief.

JAMES W. MEHAFFY,
City Attorney, for Plaintiff.

(Exhibit "A" to complaint attached being ordinance No. 1791 and being same as Ordinance No. 1791. See page — for this exhibit.)

The foregoing complaint endorsed on back as follows: "Filed and summons issued May 15, 1916. Dan D. Quinn, Circuit Clerk, by F. J. Ginocchio, D. C." Sheriff's return shows due service of summons May 18, 1916, in Pulaski County.

5 *Order Allowing Time to File Answer.*

Pulaski Circuit Court, Third Division, March Term, 1916.

Thursday, June 8th, 1916.

11031.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH AND CABLE CO., Defendant.

On this day comes defendant by its attorneys, Marshall & Coffman, and upon its motion it is granted two weeks from this date in which to answer.

6 *Filing Answer.*

Pulaski Circuit Court, Third Division, March Term, 1916.

Thursday, June 22, 1916.

11031.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH AND CABLE CO., Defendant.

On this day comes defendant by its attorneys, Marshall & Coffman, and by leave of Court files herein its answer.

7 *Answer.*

In Pulaski Circuit Court, 3rd. Division.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH & CABLE CO., Defendant.

Comes defendant by its attorneys, Marshall & Coffman, and for answer herein says it is true it is a corporation duly organized under the laws of Arkansas and authorized to do business in said State and that it accepted ordinance No. 1791 passed March 11, 1912, by the plaintiff as alleged but denies that same is a contract between it and plaintiff whereby it agreed to pay to plaintiff a license or tax of fifty cents per pole annually including underground wires at the rate of four poles to the block, and denies that pursuant to said ordinance it erected and has since maintained in Little Rock 205 poles or their equivalent or that the sum of $461.25 or any other sum is due from it to said city as a license tax or fee for same.

Further answering defendant says that by the express terms of said ordinance the privilege of erecting poles and constructing underground conduits and the duty of paying license fees thereon is confined to such poles and underground conduits as may be placed upon and under the streets and alleys and does not include poles placed upon the right-of-way of the Chicago, Rock Island & Pacific
8 Railway Co., aggregating 139 poles; that the payment of fees on the last named poles could not have been and was not contemplated either by it or by said city when said ordinance was passed and accepted; and furthermore that a large number of the last named poles were not at the time of the acceptance of said ordinance within the limits of the city of Little Rock and could not

have been and were not among those allowed to be erected and contemplated to be paid on by the terms of said ordinance.

Further answering defendants says that said sum of fifty cents per pole per year now sued for is unreasonable, excessive and unenforceable and is sought to be imposed not for inspection and regulation of its poles and wires but for revenue purposes only; that said provision imposing said fee is void, and that its acceptance of said ordinance does not therefore bind it as upon contract to pay said sum or any sum on any of its said poles or underground construction; that nothing is therefore due said city on account of said poles either the 66 pole- or their equivalent on the streets and alleys or the 130 poles on right of way.

That said provision is also void for the reason that it imposes a license fee or tax upon defendant which is confiscatory and deprives it of its property without due process of law and likewise denies to defendant the equal protection of the laws in violation of Amendment XIV of the Constitution of the United States and in violation of sections 3, 8 and 21 of Article II of the Constitution of the State of Arkansas.

That it has accepted in writing the Post Roads acts of
9 Congress and amendments thereto and is operating its business in accordance with those acts, that its poles and wires have been at all times and are now used for the transmission of messages for the United States and the various departments of Government at prices fixed by the Post Master General under the terms of said acts; that it is therefore an agent of the United States and the said provision is void for the reason that it does not expressly exclude from the tax levied the business done by it for the Government.

That defendant is engaged principally in the transmission of telegraphic messages between points in Arkansas and between points in Arkansas and points in other States of the United States and in connection with other telegraph companies and certain submarine cable companies is engaged also in the transmission of telegraphic messages between points in Arkansas and points in foreign countries; and it is therefore engaged in an interstate and international commerce business and its telegraph lines in Little Rock are used for that purpose; that said provision of said ordinance imposing a fee of fifty cents upon its poles is a burden upon, restriction of and illegal interference with interstate commerce and the right and power of Congress to regulate commerce with foreign nations and among the several States and is in violation of the Constitution and laws of the United States and is therefore void.

Further answering defendant says that the attempted construction of said provision of said ordinance whereby fees may be
10 imposed on said right-of-way poles renders it unreasonable, discriminatory and void for the reasons among others that it purchased the right to erect said poles on said right of way from the owner thereof, the said railway company, and holds said right under said railway company and none other; that it erected its poles thereon without any permission from plaintiff and neither it nor plaintiff deemed such permission necessary; that nearly all of said

right-of-way where its poles are erected is in unsettled and unfrequented grounds and woodland at remote parts of the city; that in the regulation of its poles and wires on said right-of-way defendant is subject only to said railway company for the protection of its own property and that of other companies erecting poles thereon with its consent and that no one other than its employees and licensees is allowed to go on said right-of-way and those who do so are trespassers; that the other two telegraph companies which have been doing business for many years in Little Rock have never been required to pay fees on their many poles on the rights of way of railroads which they follow within the limits of said city and one of them does not even pay on many of its poles on the streets and alleys of said city, that it is the fixed policy of said city which has been carried out for many years not to require the other two companies to pay on their poles on railroad rights of way and that upon defendants' request frequently made that it be relieved from the charge for such poles or that other companies be required to pay for
11 such poles, no corrections have been made but same charges have been made from year to year as before.

Wherefore defendant prays that the complaint be dismissed and for costs and all proper relief.

MARSHALL & COFFMAN,
Attorneys for Deft.

Endorsed on back as follows: "Filed Jun- 22, 1916. Dan D. Quinn, circuit clerk. By H. S. Nixon, D. C."

12 *Judgment.*

Pulaski Circuit Court, Third Division, March Term, 1917.

Tuesday, April 10, 1917.

11031.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH AND CABLE COMPANY, Defendant.

On this day comes plaintiff by James Mehaffy, its attorney, and comes also defendant by Marshall & Coffman its attorneys and this cause coming on for hearing before the court sitting as a jury the defendant by its said attorneys offers to confess judgment for the sum of $148.50 being amount due on 66 poles for four and one half years at fifty cents per pole per year which plaintiff refuses to accept because there are 139 additional poles on right-of-way of Chicago, Rock Island & Pacific Railway Company which plaintiff says are also subject to payment of same amount per pole.

Whereupon the court heard the testimony adduced by the parties

and the arguments of their counsel and being well and sufficiently advised doth consider, order and adjudge that plaintiff, the city of Little Rock, do have and recove- of and from the defendant, Mackay Telegraph & Cable Company, the sum of four hundred and forty-three and 75/100 dollars together with interest from this day at six per centum per annum until paid and all its costs herein expended for which it shall have execution as provided by law. Whereupon defendant asks the Court for one week's time within which to prepare its motion for new trial which is by the Court granted.

13 *Filing Motion for New Trial, Overruling Same, & Granting Appeal.*

Pulaski Circuit Court, Third Division, March Term, 1917.

Thursday, April 12th, 1917.

11031.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH AND CABLE CO., Defendant.

On this day comes defendant by its attorneys, Marshall & Coffman, and by leave of Court files herein its motion for a new trial, and said motion coming on to be heard, the same is submitted to the Court and the Court being well and sufficiently advised in the premises doth overrule said motion. To which action of the court defendant at the time saved its proper exceptions and asked that same be noted of record, which is done.

Thereupon defendant prayed and was granted an appeal to the Supreme Court of Arkansas, and defendant was granted 30 days in which to prepare and present its bill of exceptions herein.

(For motion for new trial, see page 60.)

14 *Filing and Approving Bill of Exceptions.*

Pulaski Circuit Court, Third Division, March Term, 1917.

Thursday, April 26th, 1917.

11031.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH AND CABLE COMPANY, Defendant.

On this day comes defendant by its attorneys, Marshall & Coffman, and presents to the Court its bill of exceptions herein, the same is

examined by the Court and found to be in all respects correct and is signed by the judge and ordered filed as a part of the record in this case.

15 *Bill of Exceptions.*

In Pulaski Circuit Court, Third Division.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH & CABLE COMPANY, Defendant.

Be it remembered that on the 10th day of April, 1917, being a day of the March term, 1917, of above named court, the above cause coming on to be heard before Honorable G. W. Hendricks sitting as a jury the following proceedings were had and the following evidence introduced in said cause, to-wit:

16 Mr. Marshall: We offer to pay for the 66 poles.

Mr. Mehaffy: No, sir, we will not accept it.

Court: That would only control the costs in the case.

Mr. Marshall: It would be $33.00 for four and a half years. $148.50.

Court: You offer to confess judgment for that amount?

Marshall: The amount can be figured up, yes, sir. I understand there is four years and a half.

Mr. Mehaffy: He has tendered all that before this year. I suppose we would be entitled—even if we lost—we would be entitled to interest on it.

Mr. Marshall: We will try to show that we have been trying to pay them ever since the company has been in here, and I can show the company has been ready and anxious to pay it.

Court: You didn't bring your suit until sometime later. He has a right to make the tender whenever the suit is brought. Of course, when he admits the company—along down the line, two or three years ago, should have paid the $33.00, of course, that will carry interest, but that is a question of law.

Mr. Marshall: There is just 66 poles on the city property, and the rest is on the right-of-way of the Rock Island Railroad. I want to show what the other companies have been doing.

Mr. Mehaffy: I object.

Court: I sustain your objection.

(To which ruling of the court the defendant at the time duly excepted and asked that his exceptions be noted of record, which was accordingly done.)

17 Mr. Marshall: I want to show that the other companies do not pay on the right-of-way—at least that the city does not construe it that way, and I want to offer some ordinances to show that.

Mr. Mehaffy: If that is the case I want to offer to prove that the city has never construed it that way. When the matter came up to the City Attorney's office for the first time the records will show that the advice was that since the city was required and charged with the duty of supervising the construction of poles and wires, and other things of like nature, whether they were on private property or streets or where, they should get authority for the construction from the proper officials at the City Hall, and that a fee shall be collected. If it is not collected it is a mistake or failure to perform a duty of some municipal officer.

Mr. Marshall: I want to object to that evidence on the grounds that it is not material and that it is simply the construction of the present city attorney.

Mr. Mehaffy: Let us take this up a little bit more in order. I think since the city is plaintiff that possibly it might be well for me to state what our contention is. (Stating case to the Court.)

Mr. Mehaffy: I ask permission to amend my complaint so as to allege—the former ordinance No. —, that the Mackay Contract was with reference to this ordinance, and that it was an ordinance at the time of the contract; and that this contract was made with
18 reference to and in consideration of the former ordinance—and general ordinances which say that all telegraph companies shall pay Fifty Cents per pole.

Mr. Marshall: I object to that.

Court: The objection is overruled.

(To which action of the Court the defendant at the time duly excepted and asked that his exceptions be noted of record, which was accordingly done.)

Mr. Marshall: We want to introduce the ordinance in full. I believe that is attached to the complaint, though.

Court: Yes.

Mr. Marshall: We want to introduce the contract.

Court: What contract?

Mr. Marshall: The contract with the railroad company.

Mr. Mehaffy: I want to object to that.

Court: You can offer it and put it into the record and I will sustain the objection. It will go in the record. You have a right to that, because you see if I didn't permit the contract to go into the record the Supreme Court would not know what it was.

(The contract here offered in evidence and marked Exhibit "A.")

(To the action of the court in sustaining plaintiff's objection to the introduction of the contract the defendant at the time duly excepted and asked that his exceptions be noted of record, which was accordingly done.)

19 Defendant introduced in evidence ordinance 1791 of the City of Little Rock as follows, to-wit:

Ordinance No. 1791.

An Ordinance granting to The Mackay Telegraph and Cable Company the right to construct and maintain its telegraph lines along certain streets in the City of Little Rock, Arkansas, and for other purposes.

Be it ordained by the City Council of the City of Little Rock:

Section 1. That the right be, and the same is hereby granted to the Mackay Telegraph & Cable Company, its successors and assigns, to set poles, string wires and operate and maintain lines of telegraph, including all poles and guys, cables, wires and fixtures thereon, and the installation of underground ducts and manholes along and over certain streets in the City of Little Rock as follows, to-wit:

The placing of underground ducts and the necessary manholes from the approach of the Free Bridge on Main Street to a manhole at the intersection of Main and the alley between Markham and the River; from Ashley Street east in said alley to Scott Street; thence south on Scott Street to East Second; thence east on East Second to McLean Street. Also a line of poles and fixtures and the right to string wires or cables thereon, beginning at the intersection of East Second Street and Rector Avenue and running thence on the west side of Rector Ave. to East Sixth; thence east on the north side of Sixth to the Chicago, Rock Island & Pacific Railway tracks.
20 From this point the pole line will follow on and along the right of way of said railway to the south city limits.

Section 2. Whenever a general ordinance shall be passed by the City Council of the City of Little Rock requiring all telegraph or telephone companies to place their lines or wires under ground, the said company shall, when called upon by said Council, place its wires under ground in compliance therewith.

Section 3. That the company shall pay to the City immediately upon the completion of said line, and on January 1st of each year thereafter, a license or tax of fifty cents for each pole erected or set up and a license or tax on all conduits constructed to an amount equal to four poles to each block. And said company shall comply with all ordinances hereafter passed in regard to the license or tax on poles, conduits or wires, either decreasing or increasing the same, that are general and applicable to all telegraph or telephone companies in said city. And said company agrees and consents to pay a license or tax on all its conduits displacing poles equalling the license or tax that is or may be imposed on the poles replaced by said conduits by general ordinances applying to all telegraph or telephone companies.

Section 4. That the said line of poles, wires and conduits shall be so constructed and maintained as not to obstruct the travel upon said highways, streets or alleys, and not to interfere with the flow of water in any pipe, drain, ditch or culvert. And should the grade of any street, alley or highway be changed or brought to grade
21 and the said poles, wires or conduits be found to interfere therewith, then, and in that event, the said Company agrees

to relocate such poles, wires or conduits to the line provided and furnished by the City Engineer, without cost to said City.

Section 5. The location and maintenance of wires, poles and conduits shall be subject to the approval of the City Electrician and Board of Public Affairs. The poles shall be kept painted, and the wires, poles, conduits and manholes shall be maintained in a first class condition and so as not to endanger life or limb.

Section 6. In consideration of the rights and privileges herein granted, said company shall permit said City to use as much of the upper cross arm of said poles as may be necessary for its fire alarm and police telegraph or telephone wires; provided, that said City's use of the poles shall not be so made or continued as to in any manner obstruct or interfere with the use of said poles by the said company, and all work of placing wires or fixtures of the said City upon said poles shall be done under the direction of said Company's manager in said City.

Section 7. Said company at its own expense shall restore or replace all streets, alleys, sidewalks, curbing or guttering disturbed by it, to the same condition they were in before being disturbed, and shall remove all surplus dirt occasioned by such construction. A bond in the sum of five hundred dollars, to be approved by the Mayor of said City, conditioned for the faithful performances of all obligations assumed under this ordinance by said company, shall be given and filed by said company in the City Clerk's office within thirty days after the passage and acceptance of this ordinance.

22

Section 8. Nothing in this ordinance contained shall be construed to grant to said company, or its successors, an exclusive right and the City Council hereby reserves the right to grant a like or similar franchise or franchises; provided, however, that the use thereof shall not prevent or interfere with the proper exercise of the rights and privileges herein ganted.

Section 9. The City Council shall have the power and the right at any time to revoke this franchise and repeal this ordinance upon the failure of said company to comply with any of its terms, after written notice of said failure has been given to and served on said company by said city; provided, that said revocation and repeal shall not take effect if said company, within thirty days after said notice, shall correct said fault or failure to the satisfaction of said City.

Section 10. This ordinance shall take effect and be in force from and after its passage and the written acceptance of the same duly executed within twenty days after passage by the proper officers of said company, with the corporate seal of said company affixed thereto, which said acceptance shall be recorded immediately following this ordinance in the Record Book in the City Clerk's office.

Passed: March 11th, 1912.

Approved: CHAS. E. TAYLOR, *Mayor.*

Attest:
GEO. A. COUNTS, *City Clerk.*

23 Drawn by Harry C. Hale, City Attorney, Little Rock, Arkansas.

The within ordinance is hereby accepted this 18th day of March, 1912.

MACKAY TELEGRAPH & CABLE COMPANY,
By E. MALLY, *Vice-President.*

Attest:
J. C. MARSHALL, *Secretary.*

I hereby certify that the written acceptance by the Mackay Telegraph & Cable Company of the within ordinance was duly filed in my office this 18th day of March, 1912.

GEO. A. COUNTS,
City Clerk.

STATE OF ARKANSAS,
County of Pulaski, ss:

I hereby certify the above to be a true and correct copy from the record of ordinance No. 1791 passed March, 11-1912 as recorded in Record Book No. 6, page 21.
(Published in Arkansas Gazette, Mar. 15th, 1912.)

Witness my hand and seal of such office this 19th day of March, 1912.

GEO. A. COUNTS,
City Clerk.

24 *Contract.*

Defendant offered in evidence the contract between it and the Chicago, Rock Island & Pacific Ry. Co. and others as follows, to-wit:

This Agreement, made in quadruplicate and entered into this First day of February, 1912, by and between the Choctaw, Oklahoma and Gulf Railroad Company, a Federal corporation (hereinafter called the "Gulf Company"), the Rock Island, Arkansas and Louisiana Railroad Company, a consolidated Arkansas and Louisiana corporation (hereinafter called the "Louisiana Company") and the Chicago, Rock Island and Pacific Railway Company, a consolidated Illinois and Iowa corporation (hereinafter called the "Rock Island Company"), said companies collectively called the "first parties," parties of the first part, and the Mackay Telegraph and Cable Company, a corporation organized and existing under the laws of the State of Arkansas (hereinafter called the "Mackay Company"), party of the second part.

Witnesseth:

That whereas the Gulf Company owns, and the Rock Island Company under a long term lease is in exclusive possession of and operates, a line of railway upon the right of way of the Gulf Company,

between Bridge Siding on the Mississippi River opposite Memphis, Tennessee, and Biddle, Arkansas, and between Benton, Arkansas, and Malvern, Arkansas, and between Butterfield, Arkansas, a point on said line between Benton and Malvern, and Hot Springs, Arkansas; and the Louisiana Company owns, and the Rock Island Company under a long term lease is in exclusive possession of and operates, a line of railway upon the right of way of the Louisiana
25 Company between Biddle, Arkansas, and Benton, Arkansas, and the Mackay Company desires to secure the right and permission of placing and maintaining, on such portion of said rights of way as is hereinafter described a line of poles, wires and appliances for telegraph and telephone purposes:

Now, therefore, in consideration of the premises, and of the mutual and dependent covenants and agreements hereinafter contained, to be by them respectively kept and performed, the parties of the first part, on the one hand, and the party of the second part, on the other, have agreed, and do hereby covenant and agree with each other as follows, respectively:

Article I.

In consideration of the covenants of the Mackay Company and the faithful performance of the same, and subject to the conditions hereinafter contained, the Gulf Company, the Louisiana Company and the Rock Island Company, as their respective interests may appear, hereby give and grant to the Mackay Company the permission and right to construct and at all times hereafter maintain, repair, reconstruct and operate, for telegraph and telephone purposes, a line of poles, wires and appurtenances and appliances necessary thereto, for said purposes, upon and along the right of way now occupied or as hereafter located and used by the Gulf Company and the Louisiana Company, respectively, or by the Rock Island Company as lessee thereof, between Bridge Siding, Arkansas, (the point where the railroad covered hereby connects with the line of the
26 St. Louis & San Francisco Railroad Company, a short distance west of Bridge Junction, Arkansas), and Biddle, Arkansas, a distance of 132.55 miles, more or less; between Biddle and Benton, Arkansas, a distance of 23.05 miles, more or less; between Benton, Arkansas, and Malvern, Arkansas, a distance of 22.21 miles, more or less; and between Butterfield, Arkansas, and Hot Springs, Arkansas, a distance of 16.95 miles, more or less; provided, that such pole line, wire and appliances shall be located and maintained by said Mackay Company as hereinafter provided, and that no wires or appliances in connection therewith shall be attached to any bridges or trestles without special agreement therefor; and provided further that the Mackay Company does not, and shall not, acquire any ownership in any portion of the right of way of the Gulf Company or of the Louisiana Company.

Article II.

In consideration of the foregoing grant and permission the Mackay Company covenants and agrees as follows:

Section 1. That it will pay to the Rock Island Company from time to time, as fast as the pole line is completed, the sum of ten dollars ($10.00) for each mile so constructed.

Section 2. That said pole line erected along and upon the respective rights of way of the Gulf Company and the Louisiana Company shall at all times be placed, replaced and maintained upon such location as shall be designated by the proper officer of
27 the Rock Island Company while it is in possession thereof as lessee of the railways of said two companies, and thereafter by the proper officers of said two companies, respectively, so as to afford such reasonable clearances, as to any and all tracks now or hereafter located upon said rights of way, and as to any and all pole lines now upon said rights of way, as shall be required by any such officer.

Section 3. That said pole line, wires and appliances shall be constructed and maintained in the best and most approved manner as regards depth to which the poles are set in the ground, affixing of guy wires and other appliances and shall be constructed, repaired, relocated, reconstructed, maintained, used and operated as in this agreement provided, and in such manner as not to interfere with the operation, use, repair, or maintenance of the line of railroad of the Gulf Company or of the Louisiana Company, or the operation of trains or the conduct of business thereon, and so as not to endanger or jeopardize the safety of the servants, agents, passengers or licensees of the Gulf Company or of the Louisiana Company or of the Rock Island Company, as the case may be, or the property of any of said companies, or the property in the custody of any of said companies, and in case of injury to or death of any such persons, or to or of the employees of said Mackay Company, or other persons, or damage to or destruction of the property of said Gulf Company or of said Louisiana Company or of said Rock Island Company, as the case may be, or that in the custody or under the control of any of
28 said companies, or of other persons or corporations, due to, caused or occasioned by reason of, the construction, maintenance, use or operation of said pole line, or its fixtures or appliances, or by reason of the neglect or failure of the Mackay Company to construct, use and maintain the same as in this agreement provided, said Mackay Company shall indemnify and hold harmless said Gulf Company, said Louisiana Company and said Rock Island Company, and each of them, against such loss or damage or liability therefor, and against claims and actions due to, arising or growing out of the same, and costs and expenses incident to or incurred in defending such actions, and will defend all such actions when and if called upon by the Gulf Company, or by the Louisiana Company, or the Rock Island Company, as the case may be, and will promptly pay to said

Gulf Company, or said Louisiana Company, or the Rock Island Company, the amount of any judgment rendered in any such action and expenses reasonably and necessarily incurred by the Gulf Company or by the Rock Island Company, or by the Louisiana Company, as the case may be, in defending the same.

Section 4. The pole line aforesaid shall be constructed, repaired, relocated, reconstructed, maintained and operated at all times in accordance with the reasonable regulations and requirements of the Gulf Company, or of the Louisiana Company, or of the Rock Island Company, as the case may be, regarding the same.

Section 5. That, in the event said pole line or appliances shall, in the judgment of the Gulf Company, or of the Louisiana Company, or the Rock Island Company, or the proper representative of any of said companies, as the case may be, in any way, at any time, interfere with the relocation or construction by the Gulf Company or the Louisiana Company or the Rock Island Company of any track, building or other structure, or the opening of any gravel pit or rock quarry, or the removing of any material from the right of way, or with any other use the Gulf Company, or the Louisiana Company may desire to make of the premises so owned or leased by it, it, the Mackay Company, will at its sole cost and expense, forthwith remove the said pole line and appliances to such other locations as may be selected or designated therefor by the Gulf Company or the Louisiana Company or the Rock Island Company, or, if no location therefor shall then be available upon the then existing right of way of the Gulf Company or the Louisiana Company, it, the Mackay Company, will, at its sole cost and expense, obtain a location therefor outside of so much of the right of way of the Gulf Company or of the Louisiana Company as either of the latter companies or the Rock Island Company shall require for such other use thereof, and shall, at the sole cost and expense of it, the Mackay Company, forthwith remove its said pole line and appliances from such portion of the right of way of the Gulf Company or of the Louisiana Company to such new location therefor. This provision, as to obtaining a location for the pole line of the Mackay Company outside of the right of way of the Gulf Company or of the Louisiana Company shall apply to so much of its said pole line, when originally constructed hereunder, as there shall be no location for upon the right of way of the Gulf Company or of the Louisiana Company; this to be determined by the Gulf Company or the Louisiana Company or the Rock Island Company.

Section 6. In case said Mackay Company shall not promptly remove and relocate any poles or other appliances as in this contract provided, said Gulf Company, or said Louisiana Company, or said Rock Island Company, during its leasehold, may, after reasonable demand, take down or remove such pole or appliances, and said Mackay Company shall promptly pay to said Gulf Company or said Louisiana Company or to the Rock Island Company, as the case may be, the cost and expense of so doing.

Article III.

Section 1. It is further understood and agreed that the Gulf Company or the Louisiana Company or the Rock Island Company, during its leasehold, or any of their tenant companies having trackage rights, may at any time hereafter string on any part of the whole of the said pole line not to exceed eight (8) wires between any two points on the said pole line that is to be constructed on the right of way herein granted (including also such portion of said pole line as shall be located outside of said right of way as aforesaid); the Gulf Company, the Louisiana Company or the Rock Island Company during its leasehold, or any of their said tenant companies,
31 to pay the Mackay Company the usual going rate from time to time as rental for such pole space. It is further understood and agreed that any wires that the Gulf Company or the Louisiana Company or the Rock Island Company, or the said tenant companies, as the case may be, may erect on said pole line under this agreement are to be used for telegraph or telephone purposes of the Rock Island Company or the Gulf Company or the Louisiana Company, or the said tenant companies, only, and shall not be used in competition with the business of the Mackay Company.

Section 2. It is further expressly covenanted and agreed between the parties hereto, and the grant hereinbefore made by the first parties to the Mackay Company is upon the express condition, that the Rock Island Company during its leasehold of said premises, or the Gulf Company, or the Louisiana Company thereafter, may at any time during the life of this agreement purchase from the Mackay Company, and the Mackay Company hereby covenants and agrees, upon request of any of said companies as aforesaid, to sell to it an undivided half interest in said pole line (exclusive of the wires thereon, and the cross-arms, brackets, pins and insulators therefor) at one-half of the original cost of said pole line, exclusive of the cash consideration provided for in this agreement, and less reasonable depreciation of said poles, but including one-half of the cost of any right of way fro- said pole line which may have been purchased outside of the limits of the right of way of the Gulf Company or
32 of the Louisiana Company, as hereinbefore provided; provided, that the company so purchasing shall at the same time purchase at the entire original cost thereof, less reasonable depreciation, the cross-arms and brackets therefor at that time in use for the wires of the railroad companies under Article III, Section I, of this agreement (or such proportion of the entire cost of such cross-arms and brackets, less reasonable depreciation, as the number of wires supported thereby for the railroad companies shall bear to the whole number of wires supported thereby) and that the company so purchasing such half interest in said pole line may thereupon, or thereafter from time to time, construct upon said pole line such number of wires, with the necessary cross-arms, brackets, pins and insulators therefor (including those so purchased, if any) as it may require for use for the telegraph or telephone purposes of the business of the railroad companies (including all tenant railroad companies which may at any time be granted the use of any trackage of any of the first

parties) but not to exceed the number of wires at the same time supported by said pole line for the Mackay Company; provided, however, that the purchasing company shall be entitled to the support of a minimum of eight (8) wires on said pole line; and if by reason of the pole line supporting wires to its full capacity this shall necessitate removal therefrom of wires from time to time as the purchasing company may require space for its wires up to the said mini-
33 mum of eight, the Mackay Company will, within thirty days after written demand therefor has been served upon it, accomplish such removal, and the purchasing company shall at the same time purchase, upon the basis aforesaid, the cross-arm space thus required for its wires. In case of said purchase said poles or wires shall not be used by the Gulf Company or the Louisiana Company or the Rock Island Company, or any other company, in competition with the business of the Mackay Company. It is further expressly covenanted and agreed between the parties hereto that the purchasing company, in case it shall not at any time desire to purchase such one-half interest in the entire pole line constructed under this agreement, may, at its option from time to time purchase such one-half interest in the section of the said pole line between Memphis and Little Rock, or in the section between Little Rock and Malvern, or in the section between Butterfield and Hot Springs, it being expressly understood that nothing herein contained shall be construed as granting to the first parties the right to purchase an interest in shorter intermediate sections of said pole line.

Section 3. In the event that the Rock Island Company or the Gulf Company or the Louisiana Company avails of the option of this agreement granted to purchase an undivided one-half interest in said pole line, it is mutually agreed that thereafter if for any cause not the fault of any of the parties hereto it shall become necessary at any time to remove, repair, replace or renew any of the said
34 poles, the Mackay Company shall do the work, with the written approval of the Rock Island Company or the Gulf Company or the Louisiana Company, as the case may be, in each instance, and the reasonable cost of such removal, repairs, replacing or renewal shall be divided and borne by the parties hereto in proportion to the number of wires that each shall then have on said poles, each pole to be taken by itself; and the taxes on said poles shall be divided and borne in like manner; provided, however, that any taxes on said poles solely as telegraph poles shall be borne by the Mackay Company, and any taxes on said poles solely as railroad poles shall be borne by the Rock Island Company or the Gulf Company or the Louisiana Company, as the case may be.

Section 4. It is understood and agreed that the Rock Island Company or the Gulf Company or the Louisiana Company, or their tenant companies having trackage rights, as the case may be, and the Mackay Company, shall each bear the expense of the maintenance and repair of its own cross-arms, fixtures, wires, cables and apparatus on said poles, and each shall so arrange its cross-arms, fixtures, wires, cables and apparatus on said poles and shall so maintain and operate the same as not to interfere with the maintenance and operation of the cross-arms, fixtures, wires, cables and apparatus of the other party

hereto on said poles or its rights relative thereto; nor shall any wires which may be strung upon said pole line under the provisions of Sec. 1, Article III of this agreement be so maintained or
35 operated as to interfere with the maintenance and operation of the wires of the Mackay Company thereon.

Article IV.

Section 1. Should said Mackay Company neglect or refuse after thirty days' written demand by the Rock Island Company, during its lease hold, and thereafter by the Gulf Company or by the Louisiana Company, to perform any of the foregoing covenants or conditions on its part to be performed, then said Rock Island Company, or the Gulf Company, or the Louisiana Company, as the case may be, may at its option, by notice in writing given or mailed to the Mackay Company at its last known place of address, revoke the license, grant or permission hereinabove given, and require said Mackay Company to remove its pole line and appliances from said right of way, but such revocation shall not be deemed or held to release said Mackay Company from any obligation hereinbefore contained to indemnify the Gulf Company, the Louisiana Company and the Rock Island Company as hereinbefore provided, or to pay any judgment rendered in any action as hereinbefore provided, and costs and expenses incurred in defending the same, or to pay any other sums for which said Mackay Company may be liable as hereinbefore provided.

Section 2. This agreement and all of its terms, conditions, stipulations and covenants, shall inure in favor of and be binding upon the successors, assigns and lessees of the parties hereto, respect-
36 ively, and also in favor of any party which shall at any time be in possession and enjoyment of the property of either of the parties hereto, whether as successors, assigns or lessees, of either of the parties, or as the purchaser of the property of either of the parties hereto at any judicial sale, it being understood, however, that the rights of the parties of the first part herein shall not be assigned to or exercised by any other telegraph or telephone or electric light or other pole line company.

In witness whereof the parties hereto have caused these presents to be executed by their respective officers thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested, the day and year first above written.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY,
By H. U. MUDGE, *President.*

Attest:
GEO. H. CUSH, *Asst. Secretary.*

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By A. C. RIDGWAY, *Sec. Vice-President.*

Attest:
GEO. H. CUSH, *Secretary.*

MACKAY TELEGRAPH AND CABLE COMPANY,
By E. MALLY, *Vice-President.*

Attest:
J. C. MARSHALL, *Secretary.*

37 Mr. Marshall: I want to prove that the telegraph company has accepted the act of Congress—the Post Roads Act of Congress.

Mr. Mehaffy: I will agree to that.

Court: Let it go in the record.

Mr. Marshall: And of 1866 and supplementary acts thereto. (Here introduced in evidence and marked Exhibit "B.")

Mr. Marshall: I want to prove that the boundaries of the City of Little Rock were extended in 1912, some months after the passage of the ordinance in question.

Court: I thought you agreed on the number of poles.

Mr. Marshall: But the boundaries have been extended so as to cut off a large number of poles that are now in the city on the right-of-way.

Court: The Court permits this evidence because it will control the number of poles for which the city would be entitled to recover.

Mr. Mehaffy: I am not informed as to whether any extension made in the city has any effect on this.

Court: That will have to be met later.

Mr. Marshall: I will prove that by Herbert Turner. We will get him up here now. I also want to prove that there are no poles on any street or highway where the railroad company crosses the same, and that wires are stretched across those overhead.

38 Court: I sustain the objection to that.

(To which ruling of the Court the defendant at the time duly excepted and asked that his exceptions be noted of record, which was accordingly done.)

Mr. Marshall: I also want to prove that the greater number of these poles are in unsettled portions of the city; where the railroad right-of-way runs through woodlands and unsettled districts.

Mr. Mehaffy: That is not the case. It starts at East 6th Street.

Mr. Marshall: I said the greater part of them.

Mr. Mehaffy: I will agree to proof as to the number of streets actually crossing the right-of-way within the city limits, and if that proof is introduced I want to show that a number of them pass through extremely thickly settled parts.

Mr. Marshall: It is not extremely thickly settled—just from the depot to 9th Street. Isn't that correct?

Court: There is a store at the Arch Street Pike, near the Pike.

Mr. Mehaffy: Yes, it goes all around the city. I will agree to the introduction of a map of the city.

Mr. Marshall: I want to show them that it is an unsettled portion down to the 9th Street Crossing.

Court: It is admitted then——

Mr. Mehaffy: No, it is not admitted. I will agree that a number of them run through a thinly populated part of the city, if
39 Judge Marshall will agree with me that it also goes through a portion that is thickly settled, and passes through one of the principal means of traffic from the manufacturing district in the Southeast; and one car-line crosses, and then one of the principal pikes from the country crosses.

Mr. Marshall: I want you to agree that it runs through a settled portion from the Rock Island Depot up to 9th street where the car-line is—from 6th Street to 9th Street; that it runs through an unsettled portion of the city after that——

Mr. Mehaffy: It is just as thick at 15th Street.

Mr. Marshall: I don't think so.

Mr. Mehaffy: There is big buildings on both sides of the road there. The railroad considers it of enough importance to have a watchman there.

Mr. Marshall: Also that there is a lot of buildings at 15th Street.

Mr. Mehaffy: Add to it that the pike at Moore-Crews Store and the one at Arch Street are principal thoroughfares to suburban districts.

Mr. Marshall: That it runs across 9th Street, where there is a car-line; also a pike at 15th Street; and it crosses what is known as the Sweet Home Pike; that it also crosses the Arch Street Pike, and the Arch Street Pike is a principal thoroughfare.

Court: A thoroughfare to suburban districts.

Mr. Mehaffy: Of enough importance that the railroad
40 there has an alarm bell or watchman. That it has either an alarm bell or watchman there.

Mr. Marshall: Then let it go in that way. I also want to prove that this company has tried to pay this for sometime.

Court: That they offered to pay for poles except on the right-of-way.

Mr. Marshall: For the poles on the streets—on 66 poles for sometime—for some years you might say.

Mr. Mehaffy: Have you anything to offer that it was offered for years.

Mr. Marshall: I will say—that I am satisfied it has been for two years past.

Court: That they have offered for two years past to pay the rate on the poles in the city streets.

Mr. Mehaffy: And refuses to pay on those on the railroad right-of-way within the city limits.

Mr. Marshall: On the right-of-way, but the city refuses to accept unless we pay all.

Mr. Mehaffy: The city refuses to receipt in full for it.

Mr. Marshall: I also want to prove that the Postal Telegraph Company and the Western Union Telegraph Company have had their poles and wires within the city for many years and they have not

been required by the city to pay on poles on the railroad right-of-way, and that they have a great many on the railroad right-of-way.

41 Mr. Mehaffy: I object to that.

Court: The objection is sustained.

(To which action of the Court in sustaining the plaintiff's objection the defendant at the time duly excepted and asked that his exceptions be noted of record, which was accordingly done.)

Mr. Marshall: I also want to prove that the Western Union has 70 poles on the streets and two and a half — of underground, which is equal to ten poles, and according to the last report filed it shows 64 poles on which the other companies have its wires, and this makes 144 poles, the number it pays on; and aside from these poles which are within the city limits it has 253 more poles on which it does not pay.

Mr. Mehaffy: I object to that.

Court: The objection is sustained.

(To which action of the Court in sustaining the plaintiff's objection, the defendant at the time duly excepted and asked that his exceptions be noted of record, which was accordingly done.)

Mr. Marshall: In regard to the Postal I offer to prove that it has 140 poles on the streets, and besides this 65 poles on the railroad right'-of-ways, and that it only pays on those on the streets.

Mr. Mehaffy: I object.

Court: The objection is sustained.

(To which action of the Court in sustaining the plaintiff's objection, the defendant at the time duly excepted and asked that his exceptions be noted of record, which was accordingly done.)

Mr. Marshall: I want to read this into the record then. Section 1030 of Hale's Digest of the Ordinances of the City of Little Rock.

42 Mr. Mehaffy: I want to object to the introduction of that section of the Digest in that shape, and ask that instead the original record of the council be introduced. Mr. Marshall has a copy of the notation put in by the digester, which is not in the original ordinance and is no part of the law.

Court: You will be permitted to put that in—put both of them in.

(Section 1030 of Hale's Digest here introduced in evidence.)

Mr. Marshall: I want to put in a few sections of Hale's Digest of the Ordinances of the City,—Sections 689-690-690*c* and 690*d*.

Mr. Mehaffy: I want to object to the introduction of the city ordinances in that shape and ask that instead the original ordinances of the city be introduced, rather than the wording of the indexer and digester be introduced.

Court: I give you permission to put in the original if you so desire.

(Sections 689-690-690*c* and 690*d* of Hale'- Digest here introduced in evidence.)

43 *Act of Congress.*

Defendant introduced in evidence the acceptance by it of the Acts of Congress in regard to telegraph companies as follows, to-wit:

April 22, 1912.

I, Frank H. Hitchcock, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance filed August 7th, 1911, in this department.

In testimony whereof I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

FRANK H. HITCHCOCK,
Postmaster General.

To all whom it may concern:

Be it known, that the Mackay Telegraph and Cable Company, a corporate body organized under the laws of Arkansas, through its duly authorized officers, whose signatures are hereunto attached, does hereby accept, without reservation, all of the restrictions and obligations of the Act of Congres- approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes." And the said company does especially agree that telegrams between the several Departments of the Government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company,
44 and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster General.

This declaration of acceptance is made in order that said Mackay Telegrap- and Cable Company may be entitled to the rights and privileges granted by the Act of Congress aforesaid.

Done at Little Rock, Arkansas, this First day of August, 1911.

MACKAY TELEGRAPH AND CABLE CO.,
By F. W. CONGER, *President.*

Attest:

[Seal of Telegraph Co.]

J. C. MARSHALL, *Secretary.*

Order Changing Boundary Lines of City.

Defendant introduced in evidence certified copy of the order of Pulaski County Court changing the boundaries of the City of Little Rock on May 25, 1912, as follows, to-wit:

STATE OF ARKANSAS,
County of Pulaski:

In the Pulaski County Court.

Be it remembered: That at the April Term 1912, of the Pulaski County Court: Present the Hon. Joe Asher, Judge, presiding, among others, *when* the following proceedings were had in said court on the 25th day of May, 1912, a day of said term, to-wit:

In the Matter of the Petition of the City of Little Rock for the Annexation of Certain Territory Thereto.

Now on this day, this cause coming on to be heard, being the question of annexation of certain contiguous territory to the City of Little Rock, Arkansas, as voted upon by the electors of said
45 city, on April 2nd, 1912, and the petitioner, the City of Little Rock being represented by its City Attorney, Harry C. Hale, and the remonstrants, J. H. Requa, J. S. Braddock, Braddock Land and Granite Co., Nettie F. Riffle, Clark Gay Mfg. Co., Niemeyer Mill Company, Arkansas Brick & Manfg. Co., and J. L. Hamm, by Bradshaw, Rhoton & Helm, their attorneys, C. E. Gallagher, S. R. Skeen, Wm. Gallagher, J. J. Wilson, J. M. Tower, R. F. Munzing, Tom Hays, J. F. Emerson, John Menea, E. F. Colon, Frank Skeen and J. J. Hays, by Locklar & O'Daniels, their attorneys and W. C. Ratcliffe and John F. Boyle in person, and in their own behalf and the court having heard the petition, and remonstrances, and the affidavits and oral testimony supporting same, and being well and sufficiently advised as to both the law and the evidence and being satisfied, that the law has been complied with in all things, doth order and doth permit the said City Attorney, representing the petitioner, to amend the petition for annexation so as to include only the following described territory, to-wit: East half of Section Six (6); East half of Section seven (7); that part of Southwest quarter of section eight (8) lying north of the south property line of the public road known as the Hot Springs Pike; that part of the Southeast quarter of section eight (8) lying north of the south property line of the Hot Springs Pike; also that part of the Southeast quarter of section eight (8) lying south of the south property line of the Hot Springs Pike and East of the West property line of Rose Ave.
46 (Johnson Street Extended); West half of the southwest quarter of Section nine (9); All of the northeast quarter of the northeast quarter of section eighteen (18) lying north of the South property line of the Hot Springs Pike; All of the Northwest quarter of *of* Section Seventeen (17) lying north of the South property line of the Hot Springs Pike; East half of the Northeast quarter of the Northeast quarter of section Seventeen (17); Northwest quarter of the Northwest quarter of Section sixteen (16); Northeast quarter of the Southwest quarter of Section sixteen (16); North three quarters of the Southeast quarter of section sixteen (16); North three quarters of the South half of Section- Fifteen (15) and Fourteen (14);

West half of Section Thirteen (13), and that part of Southeast quarter of Section Thirteen (13) lying west of the west property line of Ohio Ave., of Granite Park Addition; Southwest quarter of Section Twelve (12); the south part of the East half of Section One (1) to the center of the Arkansas River, all in township One (1) North Range Twelve (12) West, Pulaski County, Arkansas. And it is ordered and adjudged by the court that said amended petition be and is hereby granted and said territory annexed to and made part of said City of Little Rock, hereafter making and constituting the limits and boundaries of said City of Little Rock, Arkansas; as follows, to-wit:

Beginning at the Northwest corner of Section Five (5) Township One (1) North Range Twelve (12) West running thence
47 west along the section line between Sections Thirty-one (31) and — six one half mile-; thence south through the center of Section- Six (6) and Seven (7) to the Section line between Sections Seven (7) and Eighteen (18) thence East to the Northwest corner of the Northeast quarter of the Northeast quarter of Section Eighteen (18); thence south to the Southwest corner of the Northeast quarter Northeast quarter of Section Eighteen (18); thence east one-eighth mile to the south property line of Nineteenth Street of Hot Springs Pike; thence in a Northeasterly direction along said south property line of said Nineteenth Street or Hot Springs Pike to the west property line of Rose Ave. (Johnson Street extended); thence South to the Southwest corner of the Southeast quarter of the Northeast quarter of Northeast quarter of Section Seventeen (17); thence east to the center of the Northwest quarter of Section sixteen (16); thence South to the center of the Southwest quarter of Section Sixteen (16); thence east to the Southeast corner of the Northeast quarter of the S. W. ¼ of Sec. Sixteen (16); thence S. to N. E. corner of the South half of the Southeast quarter of the Southwest quarter of Section Sixteen (16); thence East to the Northeast corner of Southeast quarter of Southeast quarter of southeast quarter of Section Fourteen (14); thence South to the Southeast corner of Southeast quarter of Section Fourteen (14); thence east along the Section line between Sections Thirteen (13) and Twenty-four (24) to the west property line of Ohio Ave. Granite Park Addition to the City of Little
48 Rock; thence North along the west property line of Ohio Ave. to the center line of Section Thirteen (13); thence west along said center line, to the center of Sections Thirteen (13) and Twelve (12) to the Section line between Sections Twelve (12) and One (1); thence east to the Northeast corner of the Northeast quarter of Section Twelve (12); Township One (1) North Range Twelve (12) West, which is the line between range- 12 and 11 West; thence North along the said Range line to the center of the Arkansas River; thence Northwesterly along the center of said river to the center of Section Thirty-three (33) Township Two (2) North Range Twelve (12) West; thence West along the one-fourth Section line to the Northwest corner of the Southwest corner of Section Thirty-three (33); thence South to the Southwest corner of the Southwest quarter of Section Thirty-three (33); thence West to the point of be-

ginning; and said limits and boundaries are hereby so made and constituted.

And it appearing to the Court; That the foregoing order was made on the 20th day of May, 1912, but that same was not entered of record, it is now ordered that the same be entered now as of May 20th, 1912.

49 *Clerk's Certificate of Transcript.*

STATE OF ARKANSAS,
County of Pulaski, ss:

I, Dan D. Quinn, Clerk of the County and Probate Courts within and for the County and State aforesaid do hereby certify that the annexed and foregoing is a true and complete copy of the order of the court "in the matter of the petition of the City of Little Rock for the Annexation of certain territory thereto" as therein set forth and as same appears of record on page 538 Volume "Y" County Court Record Pulaski County, Arkansas.

In testimony whereof I hereunto set my hand and seal this the 27th day of March, 1917.

DAN D. QUINN,
County & Probate Court,
By W. KRALLMAN, *D. C.*

50 *Agreement of Counsel.*

It is agreed by counsel on each side that by the above order of Pulaski County Court about one mile of the right of way of Chicago, Rock Island & Pac. Ry. Co. was for the first time taken into the city of Little Rock and that the number of defendant's poles thereon thus taken into the city was and is 35 poles; that the total number of its poles including said 35 poles within the city is 205 of which 139 are on right of way and 66 on streets.

51 *Sections* 1030, *etc.*

Defendant introduced in evidence Sections 1030, 689, 690, 690*c*, 690*d* of Hale's Digest of the Ordinances of Little Rock, as follows, to-wit:

Sec. 1030. Same—Electric Companies—Poles in Streets.—Each telegraph, telephone, electric light or power company shall pay annually a sum equal to 50 cents for each pole used by them whether such poles are leased, rented or owned by them. Ord. No. 713, supra.

Sec. 689. Poles—Placing of in Streets. All telegraph, telephone and electric light poles, that may now or hereafter be erected in the city of Little Rock, shall be placed next to and just within the outer line or curb of the sidewalks, and that to prevent the obstruction of the streets and sidewalks of said city by any such poles already erected and not so placed, the persons, company, or corporation

maintaining the same are hereby required to remove and place all such poles, under their control, as to conform to the requirements of this ordinance, within thirty days from date of its passage. Ord. No. 144, June 19, 1888; Col. & Car. Dig. Sec. 428.

Sec. 690. Same—Same—Penalty for Obstruction of Street or Sidewalk. All telegraph, telephone or electric light poles now or hereafter erected or maintained in this city, and not placed as required by the provisions of this ordinance, are hereby declared to be nuisances and obstructions of the public streets of this city, and the persons, company or corporations hereafter erecting or main-
52 taining any such, or failing to remove, within sixty days from the date of the passage of this ordinance, any such already erected and under his or its control, shall be deemed guilty of a misdemeanor, and a violation of this ordinance, and upon conviction shall be punished as provided in ordinance No. 82, entitled "An Ordinance in relation to nuisances," passed July 1, 1884, and all proceedings for violations of this ordinance shall be as provided in said ordinance No. 82. Id., Col. & Car. Dig. Sec. 429.

Sec. 690c. Defacing with Posters, etc.—All persons who shall paste or tack posters of any kind upon any such poles (i. e. "Poles upon sidewalks, streets or alleys of the City of Little Rock, for telegraph, telephone, electric light, street car or other purposes"), upon conviction in the police court of the city, shall be subject to a fine not exceeding fifteen dollars for each offense. Ord. No. 375, October 12, 1891; Cf. & Car. Dig. Secs. 403-4.

Sec. 690*d*. Electric Wires and Poles—Police Officers as to Keeping Watch Over.—In addition to the duties now imposed upon the city electrician, the police of the city shall keep a general watch over all such wires and poles, and in case of accident to the same, or in case the same should at any time become unsafe from fire or any cause whatever, they shall immediately notify the agents of such firm, person or corporation to whom the unsafe wire or pole belongs. Ord. —.

53 Defendant introduced Sections 1139, 951, 952, 955, 956 of Campbell & Stevenson's Digest of the Ordinances of Little Rock, as follows, to-wit:

Sec. 1139. Same—Electric Companies—Poles in Streets.—Each telegraph, telephone, electric light or power company shall pay annually a sum equal to 50 cents for each pole used by them whether such poles are leased, rented or owned by them. Ord. 713 supra.

Sec. 951. Poles—Placing of in Streets.—All telegraph, telephone and electric light poles, that may now or hereafter be erected in the City of Little Rock, shall be placed next to and just within the outer line or curb of the sidewalks, and that to prevent the obstruction of the streets and sidewalks of said city by any such poles already erected and not so placed, the persons, company or corporation maintaining the same are hereby required to remove and place all such poles, under their control, as to conform to the requirements of this ordinance, within thirty days from date of its passage. Ord. No. 144, June 19, 1888; Col. & Car. Dig. Sec. 428.

Sec. 952. Same—Same—Penalty for Obstruction of Street or

Sidewalk.—All telegraph, telephone or electric light poles now or hereafter erected or maintained in this city, and not placed as required by the provisions of this ordinance are hereby declared to be nuisances and obstructions of the public streets of this city,
54 and the persons, company or corporations hereafter erecting or maintaining any such, or failing to remove, within sixty days from the date of the passage of this ordinance, any such already erected and under his or its control, shall be deemed guilty of a misdemeanor, and a violation of this ordinance, and upon conviction shall be punished as provided in ordinance No. 82 entitled an "Ordinance in relation to nuisances," passed July 1, 1884, and all proceedings for violations of this ordinance shall be as provided in said ordinance, No. 82. Id., Col. & Car. Dig. Sec. 429.

Sec. 955. Defacing with Posters, etc.—All persons who shall paste or tack posters of any kind upon any such poles (i. e., "Poles upon sidewalks, streets or alleys of the City of Little Rock, for telegraph, telephone, electric light, street car or other purposes"), upon conviction in the police court of the city, shall be subject to a fine not exceeding fifteen dollars for each offense. Ord. No. 375, October 12, 1891; Cf. Col. & Car. Dig. Secs. 403-404.

Sec. 956. Electric Wires and Poles—Police Officers—Duties of as to keeping watch over.—In addition to the duties now imposed upon the city electrician, the police of the city shall keep a general watch over all such wires and poles, and in case of accident to the same, or in case the same should at any time become unsafe from fire or any cause whatever, they shall immediately notify the agents of such firm, person or corporation to whom the unsafe wire
55 or pole belongs. Ord. —.

Sections 403, *etc.*

Defendant introduced Sections 403, 404 of Coleman & Carmichael's Digest of Ordinances of Little Rock, as follows, to-wit:

Sec. 403. Poles to be Painted so as to Distinguish.—All companies or persons having or maintaining poles upon the sidewalks, streets or alleys of the City of Little Rock, for telegraph, telephone, electric light, street car or other purposes, be and they are hereby required to paint their said poles in colors such as shall be satisfactory to the mayor, and shall record the same in city clerk's office and shall enable the officers of the city and the employees of said companies or persons to readily distinguish the same. And all persons are prohibited from placing upon said poles any posters of any kind.

Sec. 404. All persons who shall have the management or control of the affairs of any company or person maintaining such poles as are mentioned in the preceding section, who shall fail or refuse to comply with the preceding section, and all persons who shall paste or tack posters of any kind upon any such poles, upon conviction in the police court of the city shall be subject to a fine not exceeding $15 for each offense.

It is agreed by counsel on each side that the italicised headings to above sections of Hale's Digest and Campbell & Stevenson's Digest were inserted by the digesters and are not found in the original
56 ordinances. It is also agreed that Hale's Digest was published in 1915, Campbell & Stevenson's Digest in 1904 and Coleman & Carmichael's Digest in 1893, and that said Sec. 1030 of Hale's Digest was enacted Dec. 6, 1897.

This was all the evidence introduced by either party at the trial.

Whereupon defendant on April 12th, 1917, the finding and judgment of the court being adverse to it, filed its motion for new trial as follows, to-wit:

57 *Motion for New Trial.*

In Pulaski Circuit Court, Third Division.

CITY OF LITTLE ROCK, Plaintiff,

vs.

MACKAY TELEGRAPH & CABLE COMPANY, Defendant.

Comes defendant by its attorneys Marshall & Coffman, and moves the court for a new trial for the reasons:

First. The court erred in overruling defendant's objection to the offer of plaintiff to amend its complaint so as to allege that the alleged contract sued on was made with reference to and in consideration of general ordinances which provide a pole tax of 50 cts. per pole.

Second. The court erred in sustaining objections of plaintiff to the introduction by defendant of the contract between it and the Chicago, Rock Island & Pac. Ry. Co. in reference to placing its poles on the right of way of said railroad company, and the refusal of the court to receive said contract as evidence and in admitting it to the record only to show what was offered in evidence.

Third. The court erred in excluding evidence offered by defendant that it has no poles on the streets or highways where the railroad company crosses same and that its wires are stretched across said streets or highways overhead.

Fourth. The court erred in excluding evidence offered by defendant that the Postal Telegraph Co. and Western Union
58 Telegraph Co. have had their poles and wires within the city of Little Rock for many years and have never been required by the city to pay a tax on their poles on the railroad rights of way within the city and that they have a great many such poles within the city.

Fifth. The court erred in excluding evidence offered by defendant that the Western Union Tel. Co. has 70 poles on the streets and two and one half block of underground, the equivalent of 10 poles, and 64 poles of other companies on which it has its wires, being a total of 144 poles on which it pays, and that it has 253 poles on

railroad rights of way within the city on which it does not and has not been required to pay a tax.

Sixth. The court erred in excluding evidence offered by defendant that said Postal Telegraph Co. has 140 poles on the streets on which alone it pays a tax and has 65 poles on railroad right of way within the city on which it does not and has never been required to pay a tax.

Seventh. The finding and judgment of the court is contrary to the evidence.

Eighth. The finding and judgment of the court is contrary to the law and is contrary to both the law and evidence.

Whereupon the court, on April 12th, 1917, overruled said motion for new trial, to which ruling of the court in overruling same, defendant at the time excepted and asked that its exceptions be noted of record which was accordingly done and plaintiff prayed
59 an appeal to the Supreme Court which was granted, and defendant was given thirty days within which to prepare and have signed and filed its bill of exceptions.

Whereupon defendant tenders this its bill of exceptions, which is signed and sealed by the court and ordered to be made part of the record.

Given under my hand this 26th day of April, 1917.

(Signed) G. W. HENDRICKS,
Judge of Third Division.

Endorsed on Back: "Filed Apr. 26, 1917. J. S. Maloney, Clerk, by H. S. Nixon, D. C."

60 *Certificate of Clerk.*

STATE OF ARKANSAS,
County of Pulaski, ss:

I, J. S. Maloney, Clerk of the Circuit Court in and for the County aforesaid, do hereby certify that the foregoing is a true, correct and complete transcript of the pleadings and record entries in the case of City of Little Rock vs. Mackay Telegraph & Cable Co., therein set forth, as the same appear on file and of record in my office.

Witness my hand and the seal of said Court this 29th day of May, 1917.

[SEAL.] J. S. MALONEY,
Circuit Clerk,
By H. S. NIXON, *D. C.*

Fee Bill.

J. S. Maloney, Clerk	$2.50 pd. by Plff.		
do.	.50 pd. by Deft.	.....	$11.05
do.	This transcript	.....	5.35
Stenographer Tax		.....	3.00
W. G. Hutton, Sheriff	$5.40 pd. by Plf.		
	.65 pd. by Dft.	.....	6.05
Witnesses:			
Jas. Lawson, Certificate	#9997	$1.50	
Jno. Bleidt, do.	9998	1.50	
F. Donahoe, do.	9999	1.50	4.50

61 *Filing in Supreme Court.*

No. 4883. Pulaski, 3rd Division. G. W. Hendricks, J., $11.50. Mackay Telegraph & Cable Co., Appellant, v. City of Little Rock, Appellee. Transcript. Filed May 31, 1917. W. P. Sadler, Clerk. By C. R. Stevenson, D. C.

62 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remember-, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the Fourth Monday of May, A. D. 1917, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 29th day of October, 1917, a day of said term:

MACKAY TELEGRAPH & CABLE CO., Appellant,

vs.

CITY OF LITTLE ROCK, Appellee.

Appeal from Pulaski Circuit Court.

Record Entries.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

(May Term, 1917.)

(Caption Omitted.)

November 5, 1917.

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski county, and was argued by counsel, on

consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs.

63 It is further considered that said appellee recover of said appellant all its costs in this court in this cause expended and have execution thereof.

64 *Opinion.*

In the Supreme Court of Arkansas, Nov. 5, 1917.

No. 212.

MACKAY TELEGRAPH & CABLE CO.

v.

CITY OF LITTLE ROCK.

Statement of Facts.

The City of Little Rock in May, 1916, commenced this action against the Mackay Telegraph & Cable Company to recover from it the sum of $461.25, with interest, alleged to be the total charges due from the defendant for the past four and one-half years on account of a license fee, by virtue of an ordinance to that effect, of 50 cents for each pole erected by the Telegraph Company within the corporate limits of the City.

Section one of the ordinance under which the license fee is taxed by the City reads as follows:

"That the right be, and the same is hereby granted to the Mackay Telegraph & Cable Company, its successors and assigns, to set poles, string wires and operate and maintain lines of telegraph, including all poles and guys, cables, wires and fixtures thereon, and the installation of underground ducts and manholes along and over certain streets in the City of Little Rock, as follows, to-wit:

The placing of underground ducts and the necessary manholes from the approach of the Free Bridge on Main Street to a manhole at the intersection of Main and the alley between Markham and the river; from Ashley Street east in said alley to Scott Street; thence south on Scott to East Second; thence east on East Second

65 to McLean Street. Also a line of poles and fixtures, and the right to string wires or cables thereon, beginning at the intersection of East Second Street and Rector Avenue and running thence on the west side of Rector Ave. to East Sixth; thence east on the north side of Sixth to the Chicago, Rock Island & Pacific Railway tracks. From this point the pole line will follow on and along right of way of said railway to the south city limits."

Section three reads as follows: "Section 3. That the company shall pay to the City immediately upon the completion of said line, and on January 1st of each year thereafter, a license or tax of fifty cents for each pole erected or set up and a license or tax on all conduits constructed to an amount equal to four poles to each block. And said company shall comply with all ordinances hereafter passed in regard to the licenses or tax on poles, conduits or wires, either decreasing or increasing the same, that are general and applicable to all telegraph or telephone companies in said city. And said company agrees and consents to pay a license or tax on all its conduits displacing poles equaling the license or tax that is or may be imposed on the poles replaced by said conduits by general ordinances applying to all telegraph or telephone companies."

At the time of the passage of this ordinance, there was already a general ordinance on the question as follows: "Each telegraph, telephone, electric light or power company shall pay annually a sum equal to fifty cents for each pole use by them whether
66 such poles are leased, rented or owned by them." There were also other sections of an ordinance making it the duty of the city electrician and of the city police to keep a watch over all such wires and to perform certain specified duties in regard to them. Inasmuch as the reasonableness of the amount fixed by the ordinance in question is not questioned, we need only refer to these sections.

The defendant company offered to pay the license fee on the number of poles erected on the streets of the City but declined to pay for those erected on the right-of-way of the Chicago, Rock Island & Pacific Railway Company. Hence this law-suit.

From East Second Street and Rector Avenue to East Ninth Street the telegraph poles are erected in a thickly populated part of the city. The wires of the Company cross East Ninth Street where there is a street car line. It also crosses a turn-pike at Fifteenth Street and in that neighborhood there are several stores and quite a number of dwelling houses. It also crosses Sweet Home Pike and the Arch Street Pike; both of which are leading thoroughfares into the City of Little Rock. For the rest of the way where the poles are erected on the right-of-way of the railroad company the line runs through an unsettled portion of the city. Other facts will be stated or referred to in the opinion.

Opinion.

HART, *J.* (after stating the facts):

In Fort Smith v. Hunt, 72 Ark. 556, the court held that a
67 tax on an electric company for the use of its streets is valid so long as the amount exacted therefor is reasonable.

In Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, it was held that where telegraph companies engaged in interstate commerce, carry on their business so as to justify police supervision, the municipality is not obliged to furnish such supervision for nothing, but it may in addition to ordinary property taxation, subject the corporations to reasonable charges for the expenses thereof.

Numerous cases from the Supreme Court of the United States and from the courts of last resort of several of the State- sustaining the validity of ordinances imposing taxes on telegraph and telephone companies for the use of the streets where the amounts are reasonable, may be found in a case note to 16 A. & E. Ann. Cas. pp. 343 and 344.

It is not contended that the amount fixed in the ordinance is unreasonable and such could not be logically made when we consider the object sought to be accomplished by the ordinances, and the necessity which existed for local governmental supervision as well as the conditions which existed in the City of Little Rock and those which might reasonably be anticipated would exist in the future.

We may first consider whether or not the language of the ordinance granting the franchise to the defendant is broad enough to include a license tax upon the poles on the right-of-way of the
68 railroad company. We are of the opinion that when the language of the Section is consider- together, that it is susceptible of the construction that it was the intention of the parties that the poles to be erected upon the railroad right-of-way should be included in the license fee mentioned in Section 3 of the ordinance. Otherwise there would seem to have been but little use in designating that the pole line should follow on and along the right-of-way of the railroad to the south city limits. Little Rock is a large and growing city. The record shows that the line of the company as it was to be laid along the right-of-way of the railroad company would cross a street car line and several turnpikes coming into the city. It was highly necessary that there should be local governmental supervision of the lines across these highways for the necessary protection of the travelers along them. It was no doubt in contemplation of the parties that in a growing city like Little Rock, its streets and highways would at some time be laid out across the right-of-way of the railroad company and it would become necessary to enforce local governmental supervision over them. Hence we are of the opinion that from the language of the ordinance itself it was in contemplation of the parties that the defendant company should pay a license tax of fifty cents for each pole erected within the corporate limits of the city.

The defendant's franchise ordinance took effect on the 18th day of March, 1912. The order extending the city limits was made
69 on the 20th day of May, 1912. About thirty-five poles of the defendant company were brought into the city limits by the order extending the boundaries of the city of Little Rock.

It is earnestly insisted by counsel for the defendant that the ordinance granting the franchise to the defendant company could not embrace these thirty-five poles. But we do not agree with counsel in this contention. A city ordinance or a city contract designed for a city at large operates throughout its boundaries whatever their changes. Dillon on Municipal Corporations, 5th Ed. Vol. 3, Sec. 1304; McQuillin on Municipal Corporations, Vol. 2, Secs. 656 and 846, and cases cited; St. Louis Gas Co. v. St. Louis, 46 Mo. 121; Illinois Central Rd. Co. v. Chicago, 176 U. S. 646, and People v. Chicago Telephone Co. (Ill.) 77 N. E. 245.

Moreover at the time of the passage of the ordinance granting the franchise to the defendant company there was a general ordinance that provided that each telegraph, telephone or electric light or power company should pay annually a sum equal to fifty cents for each pole used by them whether such poles were leased, rented or owned by them. This was a general ordinance and applied to the poles of any telegraph company which might be brought within the city limits during its existence.

It follows that the judgment will be affirmed.

70 May Term, 1917.

(Caption Omitted.)

November 19, 1917.

The appellant having within the time allowed by law filed a petition for rehearing, and the same having been duly served, it is now submitted and by the court taken under advisement.

May Term, 1917.

(Caption Omitted.)

November 26, 1917.

Comes the appellee by its attorney and prays leave to file a brief in response to the petition herein, which was heretofore submitted, and for one week in which to file the same; and, being fully advised, it is ordered by the Court that the submission of said petition be opened for the purpose of receiving said response brief, and that said appellee be allowed one week from this date in which to prepare and file the same.

71 *Petition for Rehearing.*

In the Supreme Court of Arkansas.

MACKAY TEL. & CABLE CO., Appellant,

vs.

CITY OF LITTLE ROCK, Appellee.

Motion for Rehearing.

We respectfully ask for a rehearing in this cause and earnestly insist that the judgment is wrong and cannot stand without making a contract for the parties which they never made for themselves and without doing appellant a grievous wrong and subjecting it to a most gross discrimination.

This court has not noticed in its opinion and we suppose must have overlooked the other sections of the franchise ordinance, other

than Secs. 1 and 3, which we set out and which we think show that the parties did not contemplate paying on poles on right-of-way. So we will not repeat them here but still insist on them for we cannot see how the court's conclusion could have been reached in the face of them.

The court also failed to notice and we suppose must have overlooked the fact that about a mile of this line including 35 poles was taken into the city after the ordinance was passed and accepted. This judgment includes those 35 poles for 3 & ½ years; how can it be said a contract was made for those 35 poles when they were not in the city? The description of the line which this court says made a contract says that from that point it will follow the right-of-
72 way "to the South City limits." The south city limits did not when that was accepted include these 35 poles. So the court has not only held that this description made a contract but that it made a contract to pay for poles to the south city limits wherever they may be extended to in the future. If the city grows as the opinion says it is doing the "south city limits" may soon be extended five or ten miles southward; yet under this construction the company will have to pay 50 cents each for the many poles thus taken in by reason of this same ordinance. If this is what the court holds we think it should be brought forward in the opinion so that the precedent may be known for it strikes us as not being a sound construction of a contract, and one that cannot stand the test. We think this shows that no contract as to right-of-way poles was made.

We think that Sec. 1 alone is all that is necessary to show the decision is wrong and indeed it is based partly on certain supposed requirements of regulation, present and future, at certain crossings. We will notice these later. It must be conceded we think that no poles were agreed to be taxed except those erected under the franchise and authorized to be erected by it. Its object was to permit appellant to erect certain poles and string wires on them and to charge 50 cents per year each for poles thus erected; and the acceptance of the grant was a contract to pay that sum on poles thus permitted to be erected. It means this or it means nothing. "The right to be and same is hereby granted to Mackay Tel. & Cable Co. * * * to set poles, string wires and operate and maintain lines of telegraph
73 * * * along and over certain streets as follows": (naming the streets to be occupied to intersection of 6th street with railroad, not 2nd Street as the opinion has it). Then a line is added stating that from that point the pole line will follow the railroad right-of-way to the south city limits. The opinion indicates that this line would have been useless if those poles were not to be paid on. But the court's construction makes it worse than useless. It makes the city do something it could not do, that is grant a privilege to erect poles on right-of-way. We challenge any one to say the city could do that. We think the court must have overlooked this feature or its decision would have been different. Then as the contract could have been only to pay for poles privileged to be erected under the grant and as the city could not grant the right to erect the right-of-way poles, how can a contract to pay for such poles be seen

in a clause which merely describes where the line will run after reaching the end of the franchise line? Such a clause should not be given an effect leading to illegal or absurd results but should be treated for what it really was intended to be, a mere piece of descriptive information which could have been omitted without affecting the contract. As such it would not be useless for it tells why the franchise line ends at the railroad. Even if it were useless it could not be construed into a contract which was refuted beyond question by other facts and circumstances in the case. This court has often held it will not make contracts for parties but only enforce
74 those made by them.

Suppose the intersection of 6th Street and the railroad, that is the end of the franchise line, had been the east city limits and suppose the clause had said from there the line will run to Pine Bluff; would that be a grant from the city to build the line from there to Pine Bluff? Or that the City in accepting the ordinance had agreed to pay for all those poles? Yet until it can be said the city can grant the right to erect such poles on right-of-way in the city limits, the two propositions are exactly the same. The fact that the clause says "to south city limits" matters not for it is still a mere matter of description and information, inserted by the draftsman for that purpose and understood by the parties as such. It is the same as if it said from there it will run to Benton or to the south State limits for the franchise in any case granted by the city was confined to the lines and poles on the streets. It will be seen the franchise ordinance "grants" right to build on the streets but when it comes to the right-of-way there is no grant but a mere statement "from this point the line will follow," etc. Was there ever a grant couched in such words as that?

A touchstone would be could the city have prevented the building of the pole line on the right-of-way? It must be conceded that it could not because (1) it is on private property and the city cannot prevent the erection of poles thereon which are not nuisances even though wires stretch over the streets on them as we saw fully in our briefs; (2) the United States has given a franchise to the
75 company for constructing this line on the right-of-way (R. S. 5263), and (3) the State has given such a franchise (K. D., Sec. 2934-5, etc.). Then what had the city to give in consideration of license fees on right-of-way poles? Absolutely nothing for it had no more to do with permitting their erection than of poles without its borders. It cannot be said that the supervision of poles at crossings was contemplated for the only pay was 50 cents for each pole and being per pole it was exacted for the supervision of each individual pole and attached wires, and could not have been a lump sum, the equivalent of 50 cents per pole for the 139 right-of-way poles. Again what supervision is needed there to require a lump sum of $69.50 per year? Only two at each crossing are near the streets, all others are at varying distances, some of them half a mile from crossings; yet the court holds we have agreed to pay 50 cents each for all those poles regardless of their position. In our briefs we cited cases showing that owners of lands may erect poles on them and

stretch wires from them across the streets at heights not shown to interfere with travel, but these seem to have been overlooked by the court.

It is clear, we think, that even if appellant had agreed to pay the city 50 cents per pole on right-of-way there would have been no consideration and the agreement would have been void. This is one of the defenses set up by us but it seemed so clear that there was no contract to pay for these poles that it was not argued except that we urged that if the city tried to tax these poles it would be for revenue and we cited cases to show that a tax thus sought to be imposed under the guise of the police power could not be enforced (25 Pa. Sup. Ct. 403; 192 U. S. 64). It must be conceded that the appellant had the right under the State and United States laws to build its line on the right-of-way even against the city's wishes. Then if the city exacted a charge for this right given by the government the exaction even if it were agreed to would be without consideration and could not be enforced. Of course the mere guise or pretense of regulation of poles which the city cannot and does not regulate would not be a consideration. The opinion says the sum of 50 cents per pole is not claimed to be unreasonable and it is hence unnecessary to consider whether it is for rental or regulation. Citing cases. It certainly cannot be for rental for two reasons. (1) it is on right-of-way and the rental or compensation goes to the railroad not to the city and (2) because our statute gives the free use of all streets to telegraph companies (80 Ark. 499), and hence no rental can be charged even for poles on the streets. But it is only on the street poles that we admit this charge to be reasonable, the poles that have to be and can legally be inspected by the city. Certainly the court would not say that we have admitted this charge for right-of-way poles is reasonable, a charge which is not only unreasonable, not only confiscatory, but is absolutely a taking of the company's money without any compensation whatever.

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The highest court of New York has held that a city cannot exact a sum of money for an ordinance to build even on the streets which it controls to say nothing of one to build on private property which it has nothing to do with. Beekman v. R. R. 153 N. Y. 144, 158. The Supreme Court of Ohio has held that where a company has statutory right to build on the highway subject to agreement with the city, the city cannot require free telephone service nor a contract as to rates to be charged to the public. Farmer, etc. v. Columbian, etc. Co., 72 Ohio St. 525, holding also that even though the company has agreed thereto it cannot be required to carry out such agreement because there was no consideration for it. To same effect Wright v. Glenn T. Co., 112 N. Y. App. Div. 745. See also to same effect Zanesville case, 52 L. R. A. (Ohio) 150. And so in Tel. Co. v. Gainesville, 141 S. W. (Tex.) 1045, the court held that any contract to pay a city for the right to build its lines on its streets would be void for want of any consideration to support it. See also Athens case, 182 S. W. 42. And so in Kenosha case, 149 Wisc. 338 the court said: "the city had nothing to give for such a contract for it could not barter the exercise of its police power for free telephones," and held such a contract illegal and void. A telephone company is

not obliged to pay a city for constructing its lines on the highways therein, State v. Ellison, 121 N. Y. App. Div. 499. Such an ordinance cannot reserve the right to fix rates. 111 Wisc. 23.

78 These are only a few of the many cases holding that a telegraph or telephone company having the right by statute to build into a city cannot be made to agree to pay for such right to the city and any such agreement if made is void for want of consideration; and as said the same is doubly true of an exaction for building on right of way for the city had no right to exclude the company from that any more than from the streets. Telegraph companies which have complied with the Acts of Congress have the absolute right to build on the streets of all cities even against their consent if they refuse and likewise to build on all railroad rights-of-way. See among the many cases Tel. Co. v. Essex, 239 U. S. 513. This is subject only to reasonable police regulation, on the streets not on right-of-way where it is not authorized, and of course the city cannot exact money for something it cannot give.

We earnestly insist that a great wrong is about to be done and we ask that the court pause and reflect carefully. A tax of $69.50 per year in perpetuity for nothing in return may seem small but considering that it is perpetual and that many other cities have to be paid pole taxes it is not small. And this company can ill afford it. It is a new company doing interstate but very little local business and is the only one in opposition to the big monopoly which has so long ruled in the telephone and telegraph business. Not only would this decision perpetuate the wrong mentioned but it would work a gross discrimination in favor of the "upper dog." We offered to

79 prove that the W. U. has 253 poles and the Texas Postal 65 poles on right of way within the city. Yet this was excluded and this court now allows that wrong to stand uncorrected. The W. U. came in long ago without an ordinance and when the pole fees were charged they were never charged or collected except on street poles. Now the fair and just way would be for appellant to be required to pay on its street poles as agreed and that the city pass such laws as may be needed to collect from all the companies on right-of-way poles if it can do so and needs to do so. Our right-of-way poles are not exempted from any just burden by exempting them from this franchise ordinance, but they will be placed on a par as they ought to be with those of other lines, subject to any just and equal contribution to the city which may be legally imposed on it and other like companies within the city limits. Counsel has contended that he has a right to tax this company on those right-of-way poles under the general ordinances; then why seek to bind it by a so-called contract for all time rather than tax it just as the others are taxed? And if he has not sufficient ordinances at present to tax right-of-way poles let others be passed, as he says, he has the right to have them passed, to legally tax such poles, and then let all be made to pay alike on them. It is a mistake to suppose that unless this franchise is held to be a contract including payment on right-of-way poles for all time, this company will escape legal taxes on these right-of-way poles; for it will stand just as the others do in that regard as it ought to do, and will be amenable to any taxing law as

to such poles that the city may validly pass. It can be seen
80 that if this judgment stands there is no way to correct this discrimination for there is no contract from the other companies; but if it reversed as to right-of-way poles that can be at once remedied and in an equitable manner as we have said by taxing all alike, if they can be taxed validly as to the right-of-way poles, by general ordinance. And if this cannot be done then it is certainly the height of injustice to make fish of one and flesh of another just because one accepted an ordinance and another did not. If this judgment stands the result will be that the other companies will be allowed to escape taxes on their right-of-way poles as they have for many years and this small company will be the only one to pay on them. This court can prevent that by reversing this judgment, otherwise there is no remedy.

We earnestly ask that the court give us a chance to be placed at least on an equality with other like companies. This company is engaged in same business with them and is handicapped enough already without being subjected to a different law of taxation. If this company had knowingly agreed to pay 50 cts. each on its right-of-way poles then it would never have contested the matter whether legal or not. But the opinion of the court we think shows the grave doubt it has as to this being a contract to pay on right-of-way poles and the reasons we have given we think show that it cannot be such a contract.

We respectfully submit that the judgment is wrong as to poles on right-of-way and should be modified so as to include only those on the streets.

MARSHALL & COFFMAN,
Attorneys for Appellant.

[Endorsed:] No. 4883. Mackay Tel. & Cable Co. vs. City of Little Rock. Motion for Rehearing. Filed Nov. 17, 1917. W. P. Sadler, Clerk.

81 *Overruling Motion for Rehearing.*

November Term, 1917.

(Caption Omitted.)

December 17, 1917.

Being fully advised, the petition for rehearing herein is by the court overruled; and the court amends the opinion heretofore handed down herein.

82 *Clerk's Certificate.*

SUPREME COURT,
State of Arkansas, ss:

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and

proceedings in the case of the Mackay Telegraph & Cable Company, Appellant, vs. The City of Little Rock, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Little Rock, Arkansas, this February 6, 1918.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

83 Supreme Court of Arkansas.

MACKAY TELEGRAPH & CABLE CO., Appellant,

vs.

CITY OF LITTLE ROCK, Appellee.

Assignment of Errors.

1. The court erred in holding appellant liable to the tax of fifty cents per pole per year on the 139 poles standing on right of way of Chicago, Rock Island & Pac. Ry. Co., and in rendering judgment therefor in addition to the sum admitted to be due on the poles standing on the streets of Little Rock.

2. The court erred in holding that by its acceptance of the ordinance of the city granting to it the right to build its line upon certain streets thereof appellant became bound to pay said tax of 50 cents per pole per year upon all its poles on said right of way within the limits of said city or thereafter taken within the limits thereof, for the reason that by the terms of said ordinance the right to build only upon the streets was granted and not the right to build on said right of way, which last named right was not within the power of the city to grant, and by the provisions of said ordinance only the poles on the streets and not those on said right of way were to be paid on by appellant. And the court erred in so holding for the further reason that one mile of said right of way on which 35 of said poles stood was at the time of the passage and acceptance of said ordinance without the limits of said city and was not taken into the city for some time thereafter, and the parties therefore could not have had in contemplation, as the court holds they had, these 35 poles or any poles on said right of way in the passage and acceptance of said ordinance but contemplated only the street poles.

3. The court erred in holding appellants' poles on said right of way liable to said tax of 50 cents per pole per year under said ordinance, for the further reasons that it had and has the right and privilege of placing and maintaining its poles on said right of way under the Post Roads Acts of the United States upon its accepting the provisions thereof and upon its paying the owner of said right

of way for such right and privilege, all which it has done, and that any exaction of a license fee on said poles by the city or any agreement to pay for same by appellant would be without consideration and void, and same would be and is an unreasonable and
84 illegal burden on interstate commerce carried on by appellant as well as a tax on the business of appellant transacted for and as agent of the United States, all which is prohibited by the constitution and laws of the United States pertaining to interstate commerce and Post Roads.

4. The court erred in holding said poles on said right of way liable for said tax under said ordinance for the further reason that to enforce said tax on said poles would be to deprive appellant of its property without due process of law and to deny to it the equal protection of the law, contrary to Art. XIV of the constitution of the United States.

5. The court erred in holding that the crossing of one street and three turnpikes by appellant's wires without any showing of interference with or danger to travel, and the possible extension of other highways across said right of way in future, would call for supervision of all poles on said right of way and for a license tax to pay for same on each of said 139 poles on said railroad right of way, without regard to the distance of said poles from said street and said turnpikes, said tax sought to be imposee being the same as that on street poles, that is 50 cents per pole per year, inasmuch as said poles on said right of way stand where no supervision thereof can ever be made or ever be required to be made by said city, or become necessary to be made by it. And the court erred further in holding that said ordinance constitutes a valid contract to pay said license tax and that said license tax on said railroad right of way poles is a valid and enforceable license tax against appellant notwithstanding that same constitutes an illegal and unreasonable burden and restriction on interstate commerce and on the business transacted by appellant for and as agent of the United States, and that to enforce same would be to deprive it of its property without due process of law and to deny to it the equal protection of the law, all contrary to the constitution and laws of the United States.

6. The court erred in holding that under the sections of the general ordinances of the said city which are referred to in its opinion and set out in the record of said cause the said poles are subject to said license tax or any tax for supervision thereof, for the reason that said city has not been and could not legally or constitutionally be given any authority by the state of Arkansas, to impose a tax for police supervision on said poles on said right of way or on poles other than those on the streets and other public places and
85 for the further reason that said sections of said general ordinances when taken together impose such supervision tax only on poles on the streets and not on those on right of way, and for the further reason that the city being powerless to impose such a tax on any but street poles, said ordinances must be construed as applying only to street poles notwithstanding the language used may be of a general character. And the court erred further in hold-

ing that under said sections of said general ordinances as thus construed the said city may enforce said tax of 50 cents per pole per year on said right of way, notwithstanding that same constitutes an unreasonable and illegal burden on interstate commerce and on the business of appellant transacted for and as agent of the United States, and that to enforce same would be to deprive it of its property without due process of law and deny to it the equal protection of the law, all contrary to the constitution and laws of the United States, as aforesaid.

7. The court erred in refusing to reverse said cause because the trial court excluded the offered evidence that the Western Union and Texas Postal Telegraph Companies have been doing business in Little Rock for many years and during all that time they have had, the former 253 poles on railroad rights of way and the other 65 poles on railroad rights of way within the limits of said city on which they have never been required to pay any license tax under said ordinances or any other ordinances of said city, whereby and by its judgment rendered herein the court ignored and held for naught said clause of the Federal Constitution which prohibits any state from making or enforcing any law which denies to any person the equal protection of the laws.

8. The court erred in refusing to reverse said cause because of the refusal of the trial court to consider as evidence the contract between said railroad company and appellant and its exclusion of same, whereby would have been shown among other things the rights of appellant under the interstate commerce and Post Roads laws of the United States.

9. The court erred in refusing to reverse said cause because the trial court refused the offered evidence that appellant's wires at said crossings stretch across said streets from its poles standing on said right of way but not on said highways, whereby it would have been shown that poles on right of way are not liable to a supervision tax and cannot be taxed under any of said ordinances referred to in the opinion or set out in the record.

86 Wherefore for the errors above assigned appellant and plaintiff in error prays that the judgment rendered in this cause be reversed, set aside and held for naught.

JOSEPHUS C. MARSHALL,
Atty. for Appellant and Plaintiff in Error.

Filed Jan'y 31, 1918. W. P. Sadler, clerk, by J. H. Campbell, D. C.

87 Supreme Court of Arkansas.

MACKAY TELEGRAPH & CABLE CO., Appellant,

vs.

CITY OF LITTLE ROCK, Appellee.

Petition for Writ of Error.

Considering itself *agreed* by the final decision of the Supreme Court in rendering judgment against it in the above entitled case,

the defendant hereby prays a writ of error from the said decision and judgment to the United —— Supreme Court and an order fixing the amount of supersedeas bond.

Assignment of errors herewith.

JOSEPHUS C. MARSHALL,
Attorney for Defendant.

STATE OF ARKANSAS,
Supreme Court:

Let the writ of error issue upon the execution of a bond by the Mackay Telegraph & Cable Company to the City of Little Rock in the sum of $1,000; such bond, when approved, to act as a supersedeas.

Dated January 30, 1918.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed Jan'y 31, 1918. W. P. Sadler, Clerk, by J. H. Campbell, D. C.

88

Copy.

In the Supreme Court of Arkansas.

MACKAY TELEGRAPH & CABLE CO., Appellant,

vs.

CITY OF LITTLE ROCK, Appellee.

Supersedeas Bond.

Know all men by these presents that we the undersigned are held and firmly bound unto the City of Little Rock, in the penal sum of One Thousand Dollars, yet upon condition that:

Whereas the said Mackay Telegraph & Cable Co. has sued out a writ of error for reversal of a judgment rendered against it in favor of City of Little Rock by the Supreme Court of Arkansas and a citation has been issued citing said City of Little Rock to be and appear in the Supreme Court of the United States, held at Washington, D. C., Thirty days from and after the date of said citation:

Now therefore if the said Mackay Telegraph & Cable Co. shall prosecute its writ of error to effect and answer all damages and costs that may be adjudged against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

MACKAY TELEGRAPH & CABLE CO.,
By MARSHALL & COFFMAN, *Attys.*
J. C. MARSHALL.
C. T. COFFMAN.

89 STATE OF ARKANSAS,
County of Pulaski, ss:

J. C. Marshall and C. T. Coffman being each duly sworn on oath depose and say: We are each of lawful age and are citizens of Arkansas and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Two Thousand Dollars over and above our debts, liabilities and exemptions.

J. C. MARSHALL.

Subscribed and sworn to before me this 30 day of Jan'y, 1918.

[SEAL.] W. P. SADLER,
Clerk Supreme Court.

Bond approved and to operate as supe-sedeas.
Jan. 30, 1918.
E. A. McCULLOCH,
Chief Justice.

90 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because *of* the record and proceedings, as also in the rendition of the judgment, of a plea in the said Supreme Court of the State of Arkansas, before you, or some of you, being the highest Court of law or equity in the said State in which a decision could be had in the said suit between Mackay Telegraph and Cable Company and City of Little Rock, wherein was drawn in question the validity of a treaty or statute — or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, Treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Mackay Telegraph & Cable Company, as by its complaint appears, we being willing that error, if any hath been should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given,

91 that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the First day of March, in the year of our Lord one thousand nine hundred and eighteen, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this the 30th day of January, in the year of our Lord one thousand nine hundred and eighteen.

[The Seal of the District Court of East. Dist. Ark.,]
Western Division, U. S. A.

SID. B. REDDING,
Clerk U. S. District Court, Eastern District of Arkansas,
By W. P. FEILD, Jr., *D. C.*

Allowed by
E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed Jany. 31, 1918. W. P. Sadler, Clk., by J. H. Campbell, D. C.

92 *Certificate of Lodgment.*

Supreme Court,
State of Arkansas, ss:

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on January 31, 1918, in the matter of The Mackay Telegraph & Cable Company, versus The City of Little Rock, Arkansas.

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this February 6, 1918.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

93 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To City of Little Rock, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States at Washington, D. C., within (30) thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the Mackay Telegraph & Cable Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edgar, A. McCullough, Chief Justice of the Supreme Court of Arkansas, this 30 day of January, 1918.

E. A. McCULLOCH,
Chief Justice of Supreme Court of Arkansas.

Service of a copy of within citation is hereby admitted.

JAS. W. MEHAFFY,
Attorney for Defendant in Error.

[Endorsed:] Mackay Telegraph & Cable Co., Plaintiff in error, vs. City of Little Rock, Defendant in error. Citation.

94 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this February 6, 1918.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

Costs of Suit.

Costs in Circuit Court	$24.60
" " Supreme Court	31.85
Making Transcript, pursuant to Writ of Error	25.00

Paid by Mackay Telegraph & Cable Company.

Endorsed on cover: File No. 26358. Arkansas Supreme Court. Term No. 891. Mackay Telegraph & Cable Company, plaintiff in error, vs. The City of Little Rock. Filed February 26th, 1918. File No. 26358.

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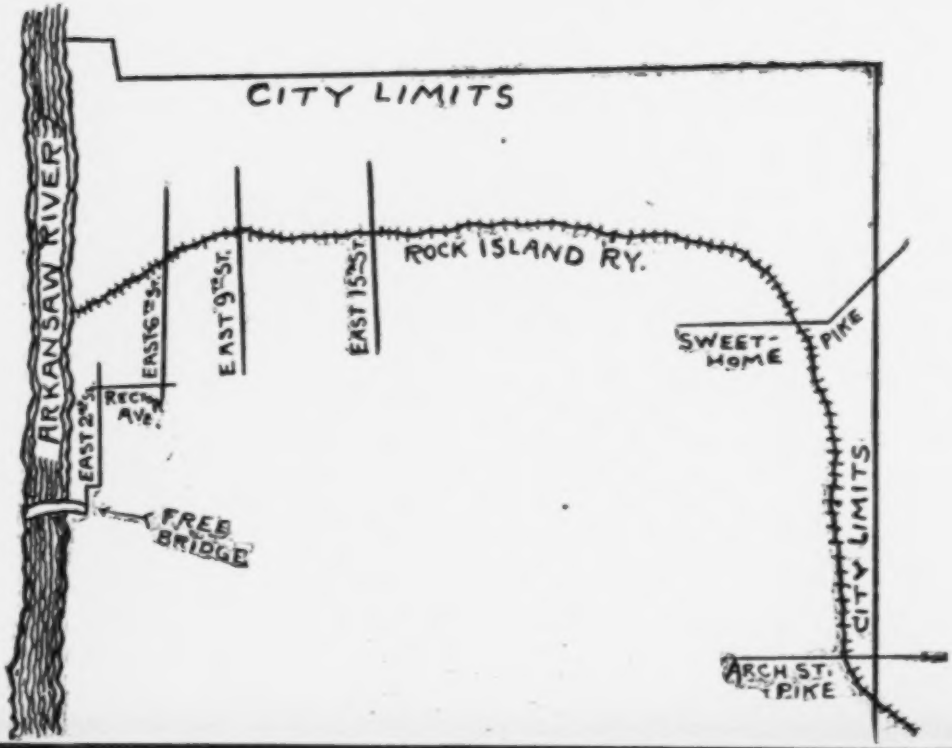
CITY LIMITS
ARKANSAW RIVER
EAST 16TH ST.
EAST 9TH ST.
EAST 15TH ST.
ROCK ISLAND RY.
SWEET-HOME PIKE
REC. AVE.
EAST 2ND ST.
FREE BRIDGE
CITY LIMITS
ARCH ST. PIKE

IN THE

Supreme Court of the United States

MACKAY TELEGRAPH & CABLE CO.

Plaintiff in Error

vs.

CITY OF LITTLE ROCK.....*Defendant in Error*

RESPONSE TO MOTION.

Comes Plaintiff in Error and for response to motion to dismiss and to affirm with damages for delay says it is not true as alleged that this court is without jurisdiction, or that no Federal question is involved or that no facts exist conferring jurisdiction upon this court; that on the contrary the various Federal questions referred to in the accompanying statement and brief are properly raised in the record and brought here for decision;

That it is not true that the writ of error herein was taken for delay or that it is frivolous or that damages should be allowed for delay on account thereof;

That counsel in his first ground denies the jurisdiction of this court and in his second and third grounds affirms its jurisdiction and asks for its judgment. Wherefore he should be required to elect or his motion should be dismissed.

J. C. MARSHALL,

Attorney for Plaintiff in Error.

I hereby acknowledge service of the response, statement and brief herein.

.....

For Defendant in Error.

STATEMENT.

The city sued the company, alleging that on March 11, 1912, ordinance 1791 was passed granting the company the right to erect and maintain its poles in the city and that same was duly accepted and is a contract between them, a copy being attached, and setting out section 3 in full which fixes a tax of 50 cents per year per pole and on underground at the rate of four poles to the block; that pursuant to same the company erected 205 poles or their equivalent within the city on which it owes for the last half or 1912 and for 1913, 1914, 1915 and 1916, $461.25. Rec. 1-2.

The answer admitted the passage and acceptance of the ordinance but denied owing anything under it; alleged that under its terms 139 poles on right of way of Chicago, Rock Island & Pacific Ry. Co., are not subject

to the tax and were not contemplated by the parties as coming within it; that a large number of poles on right of way were not taken into the city until after its passage and acceptance; that the charge made is unreasonable and excessive and is imposed not for regulation but for revenue and the provision imposing same is void; that its acceptance thereof is therefore not binding as upon a contract to pay said charge or any charge on said poles; that nothing is therefore due either upon the 66 poles on the streets or the 139 on right of way; that said provision is also void under the due process and equal protection clauses of the Federal constitution; that it has accepted in writing the Post Roads Acts of Congress and is operating its business under said acts and at prices for government messages fixed by the Postmaster General and it is therefore an agent of the government and said provision is void because the business done for the government is not expressly excluded therefrom; that it is engaged mainly in transmitting interstate and international telegraph messages constituting interstate and international commerce and said charge is an unwarranted restriction thereof and said provision is for this reason void under the constitution and laws of the United States; that said ordinance is unreasonable, discriminary and void as to claim for right of way poles because it purchased and holds its right to erect and maintain its poles on said right of way from said

railway company without permission from the city; that nearly all of its right of way poles are in unsettled woodlands in remote parts of the city; that in the regulation of such poles and wires it is subject only to said railway company and that none except railroad employees and licensees are allowed on said right of way; that the other two telegraph companies in the city which have been doing business here for many years have never been required to pay fees on their many poles on the rights of way of railroads within the city; that it is the fixed policy of the city not to charge the other two companies for poles on right of way which has been carried out for many years; that upon request frequently made by it for relief from the charge for such poles or that other companies be required to pay for such poles the city has always refused. Rec. 3-5. See maps on fly sheet.

At the trial which was before the court sitting as a jury certain admissions and mutual agreements as to the facts were made and certain documentary evidence was adduced by defendant, the material parts of which are set out herein.

Defendant offered to confess judgment for amount due on the 66 poles on the streets for the 4 1-2 years sued for amounting to $148.50 which was refused. Rec. 7. See also the judgment. Rec. 5-6.

Plaintiff asked and was granted leave to amend by

alleging that the contract was with reference to and in consideration of prior general ordinances fixing charges on poles at fifty cents each to which objections were overruled and exceptions saved. Rec. 8.

Defendant introduced ordinance 1791 sued on which is set out in full in the record. Rec. 9.

Section 1. Grants to the company the right to set poles, string wires, install underground, etc., "along and over certain streets in the city of Little Rock as follows, to-wit:" here setting out the streets and ending with the words: "thence east on the north side of Sixth to the Chicago, Rock Island & Pacific Ry. tracks. From this point the pole line will follow on and along the right of way of said railway to the south city limits."

Sec. 2. Provides that when a general ordinance requiring all such companies to put their wires underground is passed it shall put its wires underground.

Sec. 3. Fixes license tax at 50 cents per pole per year.

Sec. 4. Poles, wires and conduits must not obstruct travel on said highways, streets or alleys or the flow of water in any pipe, drain ditch or culvert; and upon change of grade of any street, alley or highway, then if necessary the company shall relocate any such poles or wires or conduits to a line to be furnished by city engineer.

Sec. 5. Location of the poles, wires and conduits to be subject to approval of city electrician and Board of Public Affairs; same to be maintained in first class condition so as not to endanger life or limb and the poles to be kept painted.

Sec. 6. City to use upper cross arm of poles for its fire alarm and police telegraph or telephone wires, but not to interfere with company's use of said poles.

Sec. 7. Company to restore all streets, alleys, sidewalks, pavements, curbing and guttering disturbed by it to former condition and remove all surplus dirt.

Sec. 9. City Council may revoke this franchise and repeal this ordinance for failure of the company to comply with its terms, after giving thirty days' notice.

Defendant offered in evidence its contract with Chicago, Rock Island & Pac. Ry. Co., and others, regarding its poles and wires, to which general objections were sustained and exceptions duly saved but court made same part of record. Rec. 8.

Article 1. Gives to defendant the right to construct and maintain its line over the railroad right of way including that in Little Rock, it not to acquire any ownership of said right of way.

Art. 2—Sec. 1. It shall pay to the railroad $10 per mile for each mile of its line on said right of way.

Art. 2—Sec. 2. Line to be placed and replaced as designated by the railroad so as to afford reasonable clearances as to tracks and other pole lines.

Art 2—Sec. 3. Pole lines, wires and appliances to be constructed and maintained in most approved manner and so as not to interfere with operation, use or maintenance of the railroad or to endanger its servants, employees, passengers or licensees and in case of injury to such persons or other persons due to the construction use, operation or maintenance of said pole lines the telegraph company to indemnify the railroad company therefor and to defend all actions and pay all judgments on account thereof.

Art. 2—Sec. 4. Pole line to be constructed, repaired (relocated, maintained and operated according to reasonable regulations of railroad regarding same.

Art. 2—Secs. 5 and 6. Telegraph company under certain circumstances named to replace its poles and wires as designated by railroad company and in case no location is available on right of way to obtain at its own cost a location outside of right of way and remove its line to such location; and in case it does not do so promptly the railroad to do so at the cost of telegraph company.

Art. 3—Sec. 1. The railroad or any of its tenant companies having trackage rights may string on any

part or the whole of said pole not exceeding eight wires upon payment of usual going rate as rental for such pole space.

Art. 3—Sec. 2. Provides for an option of the railroad to buy a half interest in the pole line and to place its own wires and fixtures thereon, in consideration of the grant given it by this contract, on terms stated therein.

Art. 3—Sec. 4. Each party to pay for maintenance of its own wires and fixtures thereon and to operate same so as not to interfere with those of the other.

Art. 4—Sec. 1. Provides for revocation of the grant by the railroad company upon failure of the telegraph company to comply with its terms and for removal of the pole line from right of way.

Defendant introduced certified copy of written acceptance by it of the Acts of Congress agreeing to send government messages prior to all others and at prices fixed by the Postmaster General. Rec. 21. Also certified copy of order of Pulaski County Court of May 12, 1912, enlarging the boundaries of the city. Rec. 21-24.

It was agreed that about one mile of right of way of Chicago, Rock Island & Pacific Ry. Co., was thereby for first time taken into the city as well as 35 poles of defendant standing thereon and that the total number of its poles including said 35 poles within the city is 205 of

which 139 is on right of way and 66 on the streets. Rec. 24.

Defendant offered to prove that there are none of its poles on any street or highway where the railroad crosses same and that its wires are stretched across such streets or highways overhead, to which objection was sustained and exceptions saved. Rec. 18. But the court in its opinion assumed such to be the facts.

It is admitted that the right of way occupied by defendant's poles runs through woodlands and unsettled districts of the city except from East Sixth street to East Ninth street and except that there are store buildings on each side of Fifteenth street where it crosses the railroad, there being a watchman there and except that where Arch street crosses the railroad there is either a watchman or alarm bell. Rec. 18-19.

It was also admitted that defendant has tendered payment of all sums due for right of way poles before suit and has been trying to get the city to accept same in full for its pole fees for the past two years or more, but same has been refused on account of the claim that the right of way poles are subject to same tax. Rec. 19.

Defendant offered to prove that Postal Tel. Co., and W. U. Tel. Co. have had their poles and wires within the city for many years and have never been required to pay any tax on their poles on railroad right of way

within the city and that they have many such poles; to which objections were sustained and exceptions duly saved. Rec. 19-20.

Defendant offered to prove that W. U. Tel. Co. has 70 poles on the streets and two and one-half blocks of underground, being equivalent to 10 poles, and 64 poles of other companies on which it has its wires, making in all 144 poles on the streets of the city, being the number its pays the tax on; also that it has besides these 253 other poles on railroad rights of way within the city on which it does not and has never been required to pay any tax to which objejctions were sustained and exceptions duly saved. Rec. 20.

Defendant offered to prove that Postal Tel. Co. has 140 poles on the streets of the city and besides these has 65 poles on railroad right of way within the city and that it pays the tax only on those on the streets to which objections were sustained and exceptions duly saved. Rec. 20.

Defendant introduced in evidence certain general ordinances of the city to show that they do not apply to poles on righ of way. Rec. 24-27.

Motion for new trial on the grounds among others that the judgment and findings were contrary to the law and contrary to the evidence, and that the court erred in excluding the offered evidence that the W. U. Tel. Co. has 253 poles and the Texas Postal Co. has 65 poles on railroad rights of way of the city and have had for many

years and that no fees have ever been charged thereon by the city.

The assignment of errors (Rec. 39-41) covers all the Federal questions which are presented in the answer, admissions and proofs and which are discussed in the brief herein.

The statement of the city is so defective and insufficient that we have had to furnish the above. The additional statements at the beginning of the brief are wholly inaccurate. The Federal questions raised and relied on are set forth in our statement of our answer and in our brief herein. We never charged as stated that we are not subject to municipal regulation because we had accepted the Post Roads Acts. As to statement that there is no proof of deprivation of property without due process or of burden on interstate commerce, these allegations are fully established as we show herein. The statement that the Supreme Court of Arkansas decided the case without reference to a Federal question is fully refuted later. The statement that the court denied the motion for rehearing without opinion is incorrect for in response to the motion it withdrew its first opinion and wrote another very different one which is before this court. In order that this court may see fully and clearly the Federal questions involved we have thought best to brief the case at some length as we have found no decision based on same line of facts.

BRIEF.

The whole contention of the company is that the 139 poles on Rock Island right of way from intersection of East Sixth street where the street pole line joins the right of way to the southern city limits are not subject to city supervision, have not been and cannot be supervised by the city on account of being on private right of way of a railroad company where they were authorized to be placed both by the state statutes and the Post Roads Acts of Congress upon paying the owner therefor which is shown to have been done; that the city made no contract to pay such fees and if it had same would be without consideration; that city supervision of right of way poles would be needless and would afford no consideration for a tax to pay therefor because in this state such supervision is only for protection of the traveling public who use the streets but not the railroad right of way. Fort Smith v. Hunt, 72 Ark. 556, *infra*. The only consideration for such fees as stated in the opinion be low, is city supervision, there being no rental charges on its poles (not even on the street poles on account of the statute giving it the free use of all streets and highways in the state . St. L., I. M. & S. Ry. Co. v. Batesville, etc. Co., 80 Ark. 499; Kirby's Dig. secs. 2934-7), and it having paid regular advalorem property taxes annually for city and all other purposes. It follows that any agreement, if one had been made, to pay such fees on the right

of way poles would be without consideration and void and that the exaction of such fees by means of an agreement, by general ordinance or in any other way would offend the Federal constitution and laws (1) by taking property without due process and without compensation and by denying the equal protection of the laws; (2) by placing an illegal burden on interstate commerce and (3) by taxing the private and government business of the company as a whole without exempting the latter, it having accepted the Post Roads Acts of Congress and become an agent of the government and engaged largely in transmitting government messages. (Williams v. Talladega, 226 U. S. 404.) As shown there is no question about the 66 poles on the streets which were offered to be paid on at the trial and several times before suit; but payment on the 139 poles on right of way has always been refused.

Our statement of the record shows that the above mentioned Federal questions are all clearly raised by the answer, admissions, proofs and motion for new trial as well as by the motion for rehearing and opinion thereon in Supreme Court.

It shows that the company several years ago accepted the Post Roads Act for doing an interstate and government business and in building through Arkansas, built through the eastern limits of Little Rock on the Rock Island right of way in question as part of its line

and as is also shown by the opinion is engaged in interstate commerce, that is doing an interstate telegraph business. The motion for rehearing which is part of the record and speaks for itself was devoted to showing that the court's holding that we had agreed in the so-called franchise ordinance to pay the fees for poles on right of way denied to us our Federal rights above mentioned The court then in its substituted opinion made certain changes but held the same as to said ordinance and held in addition that the general ordinance of the city authorized the exaction of said pole fees, thus holding against us on all the Federal questions we had raised. Our brief cited most of the cases herein cited and argued fully the infringement of our said Federal rights by the lower court in holding that both the franchise ordinance and general ordinance authorized and made effective the tax on right of way poles.

As seen, under its acceptance of the Post Roads Acts, the company had the right, and several years ago exercised the right, to build its line along said right of way upon paying for same which it did as shown by its contract with the railroad company set out in the record, without permission of the city and without paying it a cent therefor. The only charge the city could in any event make would be a reasonable one for poles on the streets which call for supervision and which are in fact supervised by it. The record shows that the line of poles on said right of way passes through an unsettled portion

of the city except three blocks from Sixth to Ninth streets, but that it crosses Ninth street where there is a car line, Fifteenth street where there are a few houses; and two pikes running out into the country; also that said four highways are crossed by wires suspended on poles standing on railroad right of way but not on said highways. The court's findings on these matters are not as strong in our favor as the record admits of (pages 18-19); and its finding that the line runs through a settled portion from Second and Rector streets to Ninth shows a misconception as to location of line in dispute and as to what the record discloses, for that part of the line, all except three blocks from Sixth to Ninth street, is on the streets and the record shows nothing as to settlement along the street line but only on the right of way, we having accepted the tax on the street line.

These surroundings of the poles in question would indicate a want of any need for supervision even if the poles were on the streets where the city has the right and power to supervise them. But the opinion uses these surroundings as a reason for holding that the parties contracted for payment on these poles in the franchise ordinance which we will notice later. The opinion argues that there is need of supervision at these four crossings and that the company must have had that in view in accepting the ordinance which the court holds binds it to pay for all right of way poles within the city

limits. But the company had the right to thus stretch its wires over the highways from poles standing on private property without charge or interference by the city, whose powers were to regulate and control its streets, there being no claim that the wires were low enough to endanger travel. Amer. Union Tel. v. Harrison, 31 N. J. Eq. 630; Summit v. N. Y. Etc. Tel. Co., 41 At. 146; Brigantine v. Holland Trust Co., 37 At. 438. Our Federal franchise to build on right of way is worthless if we cannot thus cross the highways. There is no proof and no contention that the city ever exercised the least supervision of any part of the pole line on the right of way and the conditions show that such was unnecessary even if the city had the right or the power to supervise such poles in any case. Then the city could not exact a fee for any one of the those poles, such fees resting upon no consideration except supervision by the city; and if fees on any one of those poles be exacted, as the sum of $69.50 is here sought to be exacted annually in perpetuity on them, such exaction is necessarily as stated an infringement of the Federal guaranties relied on.

The opinion says we admit the fee of 50 cents per pole per year to be reasonable, but this of course refers only to street poles. Certainly the court would not say we admit any charge on right of way poles to be reasonable, a charge which however small would be a taking of our money by strong arm methods without any quid pro quo whatever.

The opinion assumes that supervision of the poles at the four crossings and license fees charged therefor is necessary. The assumption is unfounded for as seen those wires are rightfully stretched from poles on private property just as wires are over highways in the country. The city or state does not license and charge for supervision of poles and wires at such crossings but makes it a crime for them to obstruct travel and thus protects the public. But if the assumption were well founded there would be but two poles at each crossing, eight poles in all, subject to the fee of 50 cents, being a total of $4 instead of $69.50 per year, for right of way poles. The remaining 131 poles are at varying distances from any crossing, the farthest being nearly a mile therefrom and the mile and a half of right of way between the two pikes is about half a mile wide with a vast number of parallel tracks where no street can ever cross and where inspection would be a joke, as it would be in fact all along the unsettled line of three and a half miles in question, even if it were on a street all the way, as was the case in Borough of Taylor case, infra. The court in the stress of reasoning a bad cause into a good one said that the line crosses several turnpikes whereas it crosses only two. It also took judicial knowledge that Little Rock is a growing city and said that some time in the future other crossings will be necessary but it might have gone further and taken knowledge of the railroad

yards just mentioned and of the fact that for the greater part of the remaining distance the right of way skirts a large cemetery where no crossings will ever be necessary, also that Sixth street crosses the railroad in a subway and the houses from there to Ninth street are a laundry, stone cutters' yard, etc.; no residences. But suppose the court's prophecy to be true, are we dealing in futures to such an extent that we must now begin paying $69.50 per year for nothing until all those things come about? In the Taylor case infra the court struck down a levy on street poles made ostensibly to pay for supervision of street poles because no *actual* supervision was necessary or was being exercised. We should think if the time comes when those imaginary crossings will call for supervision fees and if the law allows such fees, then we may pay for same but to make us pay for them now or to say that we agreed to pay for them now would seem to be fraught with absurdity. It will be noticed that the court never was strong on that contract but said that the language of the section when considered together is *susceptible* of that construction, thus ignoring all the other sections which we had supposed would be read in construing its meaning. It is evident that the main reason for the construction was the possible future conditions which may arise, whereas we had supposed the wording of the ordinance would be criterion of construction.

The real purpose of course is to collect revenue for

the use of the city under the guise of police regulation or supervision of these poles. But when, as all the facts here show, the claim of supervision made by the city is a mere pretense, then the exaction rests on no legal basis and this court will examine the facts for itself and so hold, and hold that Federal rights cannot thus be violated. Otherwise all Federal rights would soon be frittered away by subterfuge and this court would be powerless to prevent it.

> "We come now to an examination of the question whether this fee in the light of the admitted facts set forth in the affidavit of defense can by the widest stretch of the imagination be regarded as reasonable. The borough is, where the poles are planted and the wires stretched sparsely settled and the danger to be apprehended from neglect in regard to the poles and wires is reduced to a minimum. The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any purposes." (The poles in this case were on the streets of the borough) * * * * "When we come to examine the grounds upon which this kind of a tax is justifiable and when we find that in this case each one of those grounds is absent how is it possible to uphold the validity of such an ordinance? To uphold it is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for raising revenue and yet because it is said to be an inspection measure the court must take it as such and hold it valid although resulting in a rate of taxation which if carried out

throughout the country would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company." Postal Tel. Cable Co. v. Borough of Taylor 192 U. S. 64.

A movement is spoken of to extend Little Rock to the boundaries of the county like some other cities, and if this be done this so-called supervision tax and others like it if permitted would swamp the company. No supervision of these right of way poles is made or expected to be made and the claim that it is to be made is a mere sham to excuse the collection of revenue. The right of way by statute is 99 feet wide and at the yards the tracks cover a width of nearly half a mile. No traveler could get near enough to any of the poles on right of way to get hurt without making special effort to become a trespasser and to get hurt. Supervision of them would be ridiculous.

If this court can be deceived by the appearance of things or cannot look into their substance or disregard the mere names used by the city to evade its authority and held by the state court to be effective for that purpose, then its power to achieve the enforcement of Federal rights is completely frustrated. But such is not the case. To state such a proposition is to refute it. This court has often exercised the power of ferreting out revenue taxes masquarading as supervision fees and cannot fail to do so here.

Before citing cases on the question of jurisdiction we may profitably refer to the ordinance held by the state court to legally authorize this tax, which holding counsel contends forecloses the question of jurisdiction in this court.

The so-called franchise ordinance which we accepted and which is claimed to be a contract by us to pay the disputed fees, is set out in substance in our abstract of the record and in full at pages 9 and 10 of the record. Section 1 is as follows:

> Sec. 1. That the right to be and same is hereby granted to Mackay Telegraph & Cable Co., its successors and assigns, to set poles, string wires and operate and maintain lines of telegraph, including all poles and guys, cables, wires and fixtures thereon, and the installation of underground ducts and manholes along and over *certain streets* in the city of Little Rock as follows, to-wit: The placing of underground ducts and the necessary manholes from the approach of the Free Bridge on Main street to a manhole at the interesection of Main and the alley between Markham and the river; from Ashley street east in said alley to Scott street; thence south on Scott to Second; thence east on East Second to McLean street. Also a line of poles and fixtures and the right to string wires or cables thereon, beginning at the intersection o fEast Second street and Rector avenue and running thence on west side of Rector avenue to East Sixth: thence east on north side of Sixth to Chicago Rock Island & Pacific Railway tracks. *From this point the pole line will follow on and along the right of way of said railway to the south city limits.*

The last line is the block upon which the court stumbled in reading into an ordinance a contract which it plaintly does not contain. Those words are merely discriptive of where the line runs after it leaves the last street mentioned in the ordinance. It begins by *granting* the right to run along and over *certain streets*, naming them, not over any railroad and when the railroad is reached the words are "From this point the line will follow along the right of way," etc. It does not use a word of grant here as in case of the streets but says "it will follow," etc. Another section provides for the fee of 50 cents per pole, that is of course per pole included in the grant, not those on right of way. All other sections show distinctly that the ordinance purported and intended to grant the right only over the streets named and to levy fees only on the poles thereon, not those on right of way. It would be imputing folly to the city to suppose it intended to grant the right to build along the right of way for that it could neither permit nor prevent. That right is given the company by the Federal statutes (Rev. Statutes, sec. 5263; W. U. Tel. Co. v. Pa. Ry. Co., 195 U. S. 540); and by the Arkansas statutes which, however, we need not rely on and do not set out. (Kirb. Dig., sec. 2934-7). And of course its contract to pay on poles is confined to those poles included in the grant, that is the street poles alone, or their equivalent in underground ducts laid in certain streets.

By another section it also agreed to go underground when other companies are required to do so. This could not apply to its right of way line, for the railroad would not permit it to do so, having contracted for a pole line only, besides this would be absurd for there is no congestion of travel on the right of way (and no travel at all) which calls for underground construction. It is absurd too to say the city could contract for underground on right of way which it does not own or have anything to do with as it has with the streets. It is also agreed by the company that its construction will not obstruct travel on the streets or the flow of water in drains, etc., and that upon change of grade it will relocate its poles in position designated by the city engineer, again showing that the street poles only were those upon which the minds of the contracting parties met. Again the location of the poles and wires are to be subject to approval of city authorities and this can only mean all poles within the purview of the ordinance. How could the city approve locations on the right of way? That is the affair of the railroad alone. Its trains and other pole lines must not be endangered as is fully provided in its contract with defendant. Again these poles and wires are to be maintained in first-class condition so as not to endanger life or limb; and to be kept painted. This means life or limb of those traveling on the streets; and that poles on the street must be painted as the city cares

nothing for painting the right of way poles. The railroad's contract with defendant binds it to put in first-class construction for the safety of railroad passengers, employees and licensees and binds it to pay all damages if it does not. Again provision for the city to string wires on upper cross arm could not apply to right of way poles for that matter is fully provided for by the parties interested, the railroad having the right to string as many as eight wires thereon under detailed conditions and a joint interest in the poles with right to string as many as desired by either it or defendant being also provided for. Of course the city never contracted for its wires on these poles and could not have done so without counsent of the railroad which is not a party to this franchise. And defendant was to restore all streets, sidewalks, curbing, etc., to former condition and remove all surplus dirt, again confining the meaning to street poles alone. The last section permits the city to revoke the franchise for failure to comply with its terms which of course would carry with it the removal of all poles erected under it. Could right of way poles be torn down by the city for such a cause as this? It could not tear them down for any cause, for they are under control of the railroad which owns the right of way they stand on, and has contracted for their removal by defendant if it fails to comply with its contract with the railroad.

To show that the minds of the parties did not meet

on paying for the right of way poles we showed that 35 of the poles now sought to be taxed were not then in the city. The court sought to meet this by saying a city ordinance or contract operates to its boundaries, whatever may be its changes, which does not answer our argument that this shows the minds did not meet on the inclusion of *any* right of way poles in the contract to pay fees. We suppose if the said last line had stated that from there the pole line would follow the right of way to the south *county* limits it would be said its acceptance was a contract to pay on all poles in the country to the county line, for the city had just as much power to grant the right to build *beyond* the city limits as to build on right of way *within* the city limits, that is to say, no power at all. The court says the said last line would be useless if not a grant but it would not be useless. Its purpose was to show why the line which was the subject of the grant ended at the railroad. Even if it were surplusage it could not be construed into a grant and its acceptance into a contract when every word of the ordinance shows to the contrary.

Now as the city has been sustained by the court in using this far-fetched construction of the ordinance into a contract to pay on right of way poles, as a means of invading Federal rights, can it be that this court will not look into the ordinance for itself and circumvent such an evasion and subterfuge? We think not. And fur-

thermore even if the ordinance had exacted of us and we had agreed to pay on the right of way poles in order to get into the city, the contract therefore would have been void for want of consideration. It seems self-evident that the city cannot charge us by contract or otherwise for something which it has no right to give and for which it can and will perform no service whatever.

A city cannot exact a sum of money for an ordinance to build even on the street, to say nothing of one to build on private property on which the city has no control of poles. Beekman v. R. R., 153 N. Y. 144, 158. Where a company has statutory right to build on the highways subject to agreement with the city, the city cannot require free telephone service nor a contract as to rates to be charged the public as a condition of building thereon. Farmer, etc. vs. Columbian, etc. Co., 72 Ohio St. 525, holding also that even though the company has agreed thereto it cannot be required to carry out such agreement because of want of consideration. To same effect, Wright v. Glenn & Co., 112 N. Y. Ap. Div. 745; Zanesville case, 52 L. R. A. (O.) 150. And so in Tel. Co. v. Gainesville, 141 S. W. (Tex.), 1045, court held that any contract to pay a city for building its lines on its streets is void for want of consideration. So in Kenosha case, 149 Wis. 338 court said: "The city had nothing to give for such a contract for it could not barter the exercise of its police power for free telephones,"

and held such a contract illegal and void. A telephone company is not obliged to pay a city for constructing its lines therein. State v. Ellison, 121 N. Y. Ap. Div. 499. Such an ordinance cannot reserve the right to fix rates. 111 Wis. 23. These cases were all decided under the Post Roads Acts of Congress or under similar acts of the states giving the right to build on the streets. They are only a few of the many like cases holding that telegraph companies having a statutory right to build on the streets cannot bemade to agree to pay for same and if they do the agreement is void for want of consideration; and this is of course true as to building on railroad rights of way for there they also have the statutory right to build thereon and being on private property the city could not exclude them from building thereon even if there were no such statutes. Telegraph companies which have accepted the Post Roads Acts as is well known have the absolute right to build on the streets of all cities even against their consent as well as to build on all railroad rights of way upon payment by agreement or condemnation being made. See among the many cases New Eng. Tel. Co. v. Essex, 239 U. S. 513.

Then if a void contract is used by the city and the court as a means of defeating Federal rights the case is the same as if a wrong construction of an ordinance into a contract had been so used, and in either case this court must look into the matter for itself and if Federal rights

are thus about to be defeated, it will take jurisdiction regardless of the state decision against those rights, having assumed the form of construing an ordinance.

In N. W. etc. Rd. Co. v. Beaham, 242 U. S. 148, the state court held that a certain writing did not constitute a contract limiting liability for baggage, although tariff schedules were filed with the Interstate Commerce Commission and posted as the law requires. This court held that the writing *did* constitute a valid contract and among other things said:

> "In order to determine the liability for baggage it was proper to consider applicable tariff schedules on file with Interstate Commerce Commission; and the carrier had a Federal right, not only to a fair opportunity to put these in evidence, but also that when before the court they *should be given due consideration,*" citing cases.

And so in St. L. I. M. & S. Ry. v. Starbird, 243 U. S. 592 the bill of lading requiring notice to the delivering line of damages to the goods within 36 hours after notice of their delivery to the consignee, was held not to constitute a contract by the Arkansas Supreme Court; *held* here that it *did* constitute a valid contract and that the failure of state court to so hold was a *denial of a Federal right,* citing cases.

And so in St. L. I. M. & S. Ry. v. McWhirter, 229 U. S. 265 suit was brought to recover for death of plaintiff's intestate while engaged in interstate commerce.

It was held that the question of amount of evidence necessary to establish liability is a Federal question and this court may review the decision of the state court for that reason.

> "The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise was intended it was *far too important to be left to implication.* In form the words of this part of the instrument (ordinance) are the words of the company alone. They occur in that part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city." (Here the first section supposed to contain the contract is in the words of the city). Knoxville Water Co. v. Mayor, etc., 189 U. S. 434.

> "We are of opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. * * * The words relied on by plaintiff express its promise in consideration of the privileges granted, not a promise by the city (citing Knoxville Water Co. case sup.) It is very true the contract was in the form of an ordinance but the ordinance was drawn as a contract to be accepted and it was accepted by plaintiff (just as it was by defendant in instant case). * * * Findings either at law or in equity may depend on questions that are re-examinable here. The admissibility of evidence or its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or *contract;* or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court. Such questions properly saved must be answered and so far as it is necessary to examine the evidence in order to answer

them or to prevent an evasion of real issues, the evidence will be examined." Cedar Rapids Gas Lt. Co. v. City, 223 U. S. 655.

Many more such cases might be cited but we assume that this court is very familiar with questions of its own jurisdiction and especially so plain a one as that here involved.

The court by holding in its last opinion that the the disputed fees are enforcible under the general ordinance seems to have abandoned its first position; for if the company built into the city under a special franchise ordinance whereby it made a valid contract to pay the disputed fees then no other ordinance could apply to it in that or any other matter covered by said special ordinance. We demonstrated in our briefs, we think, that the city had recognized its limitations by passing no such general ordinance; that its ordinances when taken together show that its levy of supervision fees is confined to poles on the streets, the only ones it has by statute any control of; that even if its ordinances on its face appears to levy a fee on all poles in the city we should not say it has exceeded its plainly expressed powers but should say as the courts have done that such general language refers only to street poles, the only ones it has by statute any control over. Borough v. W. U. Tel. Co., 26 Pa. Sup. Ct. 346). But the court construed it otherwise and we suppose that under the rule, this court will

hold such construction binding and that such an ordinance is valid under the Arkansas statutes; but this is far from holding the ordinance thus construed, valid under the Federal constitution and laws. We do not believe the state laws any more than the Federal were intended to permit enforcement of such an ordinance, but it would be academic to discuss that now. The opinion without reasoning or citing authority holds that the poles of any telegraph company within the city limits are subject to the fees of 50 cents per pole provided in a general ordinance of the city. This of course would include all poles on private lands and is a startling proposition on its face. In order to show that such an exaction is only made and claimed to be made under the police power we may cite some authorities after which we will show that this attempt to invade Federal rights by means of a pretended and arbitrary application of the police power can be looked into and frustrated by this court.

The right to regulate and tax poles is found in section 5530 Kirby's Digest of the Statutes of Arkansas, which gives cities control of their streets, alleys and other public places and certainly has no reference to railroad right of way which is none such. It is as follows:

> "Sec. 5530. The city council shall have the care, supervision and control of all the public high-

ways, bridges, streets, alleys, public squares and commons within the city; and shall cause the *same* to be kept open and in repair and free from nuisances."

In Ft. Smith v. Hunt, 72 Ark. 556 a pole license tax was imposed on telegraph and other pole companies just as in the instant case. The court said at pages 562-3:

> "The sum is required to be paid as a license. As used in the ordinance the word license means the sum paid for permission to erect or maintain poles in the streets and alleys of the city, for the purpose of defraying the expenses of regulating and controlling the use of same under the police power of the city. This is necessary for the protection of the public against the electricity with which the wires on the poles are charged, against the falling of the wires and poles and the obstruction of the public highway and for other purposes."

The court in above quotation not only impliedly excludes right of way poles from the tax for there is no public there to be protected (all except railroad employes and licensees being excluded) and no public highway to be obstructed, but it expressly confines the license tax power to poles on streets and alleys. And to same effect see Fort Smith v. Willis, 121 Ark. 606; Fort Smith v. Scruggs, 70 Ark. 549, and many other Arkansas cases.

The duty of a city as guardian of its public highways gives no right whatever over the *adjoining limits* as for instance to prevent the owner of land between the

end of a street and the permanent pier line from constructing a pier thereon. Brooklyn v. N. Y. Ferry Co., 23 Hun. 277.

By virtue of the general police powers delegated to it by the state to regulate and control its *streets* a city has the right to regulate the construction of telegraph lines within its limits and to require their erection to be under the supervision of the superintendent of police. City v. W. U. Tel. Co., 11 Phila. 327, S. C. 36 Cent. Dig. p. 1950.

The city has the right as a matter of police regulation to supervise and control by such ordinances as may seem proper the erection of poles upon and the strechíng of wires along its *streets*. 12 At. (Pa.) 144.

A city as a police regulation may require the payment of a licennse fee from a telephone corporation for permission to maintain its poles on the *streets*. City v. Tel. Co. 15 Pa. Co. Ct. 518, S. C. 36 Cent. Dig. p. 1951.

An ordiance requiring an electric light company to pay a fixed sum for each of its poles comes within the police power over the *streets*. Ridley v. Electric, etc., Co. 7 Del. Co. Rep. 395; 9 Pa. Super, Ct. Rep. 615, 620, 621, S. C. 14 Dec. Dig. p. 1730.

One of the most common exercises of the police power is the regulation and license taxation of electric poles on streets, and nearly all the states have statutes

allowing cities this right. (See Crosswell Electricity Chap. 6.) If not expressly given, this right is implied from that to regulate streets. All relevant cases hold it to be a proper exercise of that power. Dill Mun Corp. Sec. 691; 107 N. Y. 593. This is elementary and need not be dwelt on or supported by citing further cases. Then if the power to tax poles arises from the power to regulate streets, the tax of course is confined to poles on the streets.

Sec. 5263. Rev. Statutes of United States gives to telegraph companies which have accepted its provisions the right to build upon all post roads which include all public roads, streets and highways (Act March 1, 1884). It also includes the right to build upon railroad rights of way. These are not public highways but are private property and the right cannot be exercised without condemnation or purchase (W. U. Tel. Co. v. Pa. Ry. Co. 195 U. S. 540). And the Arkansas statute (Kirby Dig. Sec. 2934-5) gives to telegraph companies the free use of all streets and highways in the state and gives them the right to build on railroad rights of way by condemnation or by consent of the railroad company. These statutes necessarily limit the city to regulation and license taxation of steet poles alone and exclude such power over those on rights of way of railroads. In the instant case the owners consent was obtained and a proper contract entered into with it regulating the

whole matter of the erection, use and maintenance of the poles on right of way. The city has no legal right to regulate those poles or to impose a license tax on them, which can be done only to pay for regulation of them and no such regulation exists or can exist under the law.

Section 5461, Kirby's Digest provides:

> "They (municipal corporations) shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof."

> "They shall have the power to prevent injury or annoyance within the limits of the corporation, from anything dangerous, offensive or unhealthy." Kirby's Digest, Sec. 5438.

There is and could be no claim that these poles which stand on private property are a nuisance or interfere in any way with the rights of others, which would be the only ground for police regulation of them by license fees or otherwise. The proof shows that these poles stand on right of way the width of which is fixed by law at 99 feet, and the width here is much greater than that because of numerous switches and yard tracks which extend along almost the entire line in question. It shows too as seen that the line extends through woodlands and unsettled parts of the city, a considerable

part of it having been taken into the city since the franchise ordinance was passed; and that defendant is bound to the railroad to keep its line in first class condition. It would be absurd to say in face of all this and much more in the record that these poles and wires are a nuisance or are harmful to others. This court has often held that a thing cannot be made a nuisance by the city declaring it to be such (if we assume it has done so here), but it must be proved to be such and burden is on those charging it to be such. Lonoke v. C. R. I. & P. Ry. Co., 92 Ark., 546 and cases cited. 29 Cyc, 1197.

> "The owners of city lots or other property in a city may keep them and use them as they wish, free from interference on the part of the municipality, provided that in so doing they do not create or maintain a nuisance or cause inconvenience, damage or harm to others. 28 Cyc. 735; City of Chicago v. The Gunning System, 70 L. R. A. 230 (Ill.); Re Kelso 2 L. R. A. N. S. (Cal.) 796.

In a note to A. T. & S. F. Ry Co. v. Spaulding, 66 L. R. A., 587, the writer says:

> "There is no question that so far as the rights of the railroad company go they are as exclusive as those of a private owner. Thus it has been held that a railroad company has the right to the possession of its rights of way and to its exclusive enjoyment, and it may exclude all persons and beasts therefrom at any and all times, if they attempt to come on the right of way without right. Walsh v. Virginia, etc., R. Co. 8 Nev. 10. And that a railroad company has the right to the free and uninterrupted enjoyment of its right of way. The

right is the same in character and degree that the holder of the freehold has to the exclusive use and occupation of his premises. Mobile & O. R. Co. v. Williams, 53 Ala., 595. So the right of the railroad company to the use of its right of way is exclusive. Hurd v. Rutland, etc., R. Co., 25 Vt. 121."

It is held in Fort Wayne v. Lake Shore, etc., Co., 18 L. R .A. (Ind.) 367, that a city cannot without express statutory authority or the consent of the railroad company convert its right of way into a street or open one lengthwise thereon. Even if the city had authority to do that it could not, until it made the right of way a street, treat the poles thereon as street poles for the purpose of regulation or license taxation.

In Norfolk & Southern R. Co. v. Moorehead City 83 S. E. (N. C.) 259 the railroad right of way extending 100 feet on each side of the track, by long acquiescense and use became a street of the city, the curb being laid at the outer edge of same and the sidewalk extending out from the curb beyond the right of way. The council ordered the telegraph poles removed from the middle of the driveway where they had been originally placed to points not over two feet from the curb within the driveway or right of way, held a valid exercise of police power over streets. The court said:

"Where a railroad right of way *has become an established street* of the city the same is subject to municipal regulations made in the reasonable exercise of the police power for the public benefit."

And see Goldsboro case 232 U. S. 548 for similar holding under same state of facts.

And so in Borough of Norwood v. W. U. Tel Co., 25 Pa. Super Ct. 406, the telegraph poles on a turnpike which had become a public street were held taxable under the police power, the court saying:

> "A turnpike road is a public highway; it cannot be closed against the public use; its obstruction is a public nuisance for which indictment will lie, (citing cases) * * * The borough has power to make reasonable regulations to prevent what if done on any other public highway within its limits would be a nuisance, provided no right or franchise of the turnpike company is abridged or infringed by such regulations."

As there was no proof made by plaintiff that the right of way poles were ever inspected, and as there could be no presumption that there ever was an inspection of them, which is the only possible basis for the charge sought to be made (and the city has no police power to inspect and tax them), it is clear that the present attempt to tax them is prohibited as being an unlawful burden on interstate commerce and as being imposed under the guise of the police power when in reality for revenue (Borough of Norwood v. W. U. Tel. Co. Sup.; Borough of Taylor v. Postal, etc., Co. 192 U. S. 64), and is likewise violative of the due process and equal protection clause of the Federal Constitution.

Furthermore defendant being engaged in interstate commerce and having accepted the Acts of Congress as aforesaid, is transmitting government messages prior to all others and at rates fixed by the Postmaster General (see U. S. Rev. Stat. Sec. 5266, and see said acceptance), and hence any license fee for revenue—and as seen fees for poles on right of way could only be intended for revenue and not for regulation—could be imposed only by an ordinance which excepted from its provisions the government business, and none of those relied on by plaintiff do this. William v. City of Talladega, 226 U. S. 404; W. U. Tel Co. v. City of Troy (Ala.) 61 So. Rep. 488.

We certainly do not question the extent of the city's police power but we do not think that because it is conterminous with the city limits it applies equally to poles or other erections on streets and on private lands. As shown by the cases this power has to be applied all over the city or to certain localities according to the subject matter involved. The execution of the criminal law for example extends to every foot of land in the city but the protection of the public against improperly placed poles, or from improper use of vehicles, etc., is confined to the streets alone. Scavenger wagons for good reasons must be regulated wherever they go but the speed limit ordinance would not prevent a man from driving as fast as he pleased within his own enclosure. So we

repeat that right of way poles cannot be licensed as here attempted, for property rights cannot be arbitrarily taken away under the guise of the police power. Certainly the city cannot despoil its property owners by means of a fictitious, simulated or capricious use of the police power. Dobbins v. Los Angeles, 195 U. S. 23.

In the case just cited the court said:

> "Municipal laws and ordinances and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power or whether under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property."

In Connolly v. Union Sewer Pipe Co., the court said:

> "But as the constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state even when avowedly enacted in the exercise of its police powers, must yield to that law. * * * The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety; but if by their necessary operation, its regulations looking to either of those ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void," citing many cases.

And so in W. U. Tel. Co. v. State of Arkansas, 216 U. S. 1, this court said:

> "We are aware of no decision by this court holding that a state may by device or in any way, whether by a license tax in the form of a 'fee' or otherwise, burden the interstate business of a corporation of another state."

We deem it unnecessary to accumulate citations upon so plain a principle. It is enough we think to say that if the courts of this government are not empowered to discover and strike down every effort however concealed to undermine its authority, then it is not a government. It is evident that the ordinances of the city as construed by this decision would if enforced deprive the company of its property without due process and deny to it the equal protection of the laws as well as burden illegally its interstate business and the business it does for the United States.

There is another respect in which the state court has deprived the company of the equal protection of the law and that is the fixed policy and unbroken practice of the city not to collect from other companies, as shown by the offered evidence at pages 19-20 of the record. It would show a most unjust discrimination in favor of the other two companies and against defendant to construe and enforce the ordinances that way. (See Hannibal case 31 Mo. Ap. 23; 28 Cyc. 370, 767; Simrall v. City, 9 L. R. A. 556; Frank Ex parte 28 Am. R. 642.)

tain that our Federal rights were properly claimed and were denied. It would be impossible to sustain the city in collecting the fees in question without infringing the Federal guarantees we have invoked.

We submit that the motion should be denied.

J. C. MARSHALL,

Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

MACKAY TELEGRAPH & CABLE COMPANY.....*Plaintiff in Error,*

v. No. 891.

THE CITY OF LITTLE ROCK.....*Defendant in Error.*

MOTION OF DEFENDANT IN ERROR FOR DISMISSAL OR AFFIRMANCE AND BRIEF.

To Mackay Telegraph & Cable Company, Plaintiff in Error, and Josephus C. Marshall, its Counsel:

Please take notice that on the 30th day of December, 1918, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the attached are copies will be submitted to the Supreme Court for the decision of the court thereon. Annexed hereto is copy of brief of argument to be submitted with said motion in support thereof.

James W. Mehaffy,
Counsel for Defendant in Error.

I hereby acknowledge service of the foregoing notice with the copy of the motion to dismiss or affirm and the statement and brief thereon, this the 27 day of Nov, 1918.

J. R. Marshall

Counsel for Plaintiff in Error.

MOTION TO DISMISS OR AFFIRM UNDER RULE 6.

Comes the defendant in error herein, by James W. Mehaffy, its counsel in that behalf:

I.

And moves the court to dismiss the appeal filed herein for want of jurisdiction, because the judgment from which said appeal purports to have been taken and the judgment upon which the writ of error is sued out, is the judgment of the Supreme Court of one of the United States, towit, the Supreme Court of the State of Arkansas, and no Federal question is involved. No facts exist conferring jurisdiction upon this court.

II.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm said judgment upon which the said writ of error purports to have been sued out, because it is manifest that said appeal was taken for delay only.

III.

And said defendant in error, by counsel as aforesaid, also moves the court for the assessment of ten per cent damages on the amount of said judgment, because the said writ of error, is taken for delay only.

James W. Mehaffy,

Counsel for Defendant in Error.

STATEMENT.

The defendant in error, the City of Little Rock, brought suit in the Pulaski Circuit Court against the plaintiff in error, Mackay Telegraph & Cable Company, to recover from it the sum of $461.25, with interest, alleged to be past due from the telegraph company on account of unpaid license fees by virtue of an ordinance levying a tax or fee of fifty cents per annum for each pole erected and maintained by the telegraph company within the corporate limits of the city.

In the lower court it developed that a number of the poles erected by the telegraph company in the city of Little Rock were on the city streets, while some were on the right-of-way of the Chicago, Rock Island & Pacific Railway Company within the limits of the city. The plaintiff in error offered to pay the license fee on the number of poles erected in the streets of the city, but declined to pay for those erected on the right-of-way of the railroad. Judgment in favor of the plaintiff below, defendant in error here, was rendered in the Pulaski Circuit Court. Appeal was taken to the Supreme Court of the State of Arkansas and the judgment was affirmed. From said judgment of the Supreme Court of Arkansas plaintiff in error appealed to this court by writ of error to the Supreme Court of Arkansas.

In affirming the judgment of the lower court, the Supreme Court of Arkansas merely construed a municipal ordinance of the city of Little Rock and did not decide or even mention a Federal question. (Record, pp. 30-33.) The plaintiff in error filed a motion for rehearing in the Supreme Court of Arkansas, which motion was denied without opinion. (Record, p. 38.)

BRIEF.

The appeal in this case should be dismissed for the reason that this court is without jurisdiction, because no Federal question was decided by the State court nor was the decision of a Federal question necessary in the judgment which was rendered.

Plaintiff in error alleged in its answer (Record, pp. 3-5) in the State Circuit Court that the ordinances of the city of Little Rock sued upon were void, because,

First. The collection of the license fee under the ordinances deprived the plaintiff in error of its property without due process of law guaranteed by Amendment 14 to the Constitution of the United States.

Second. Plaintiff in error had accepted the Post Road Acts of Congress, and was not therefore subject to municipal regulation.

Third. That the pole tax was a burden upon interstate commerce.

No proof was introduced to support the first and third allegations and these contentions were not pressed in the state courts. The ordinances were conceded to be reasonable as to the poles erected and maintained upon the city streets. Plaintiff in error tendered payment of the fees for the poles in the streets but contested the city's right under its police power to

impose a tax or fee on the poles on the railway right-of-way within the city limits. The Supreme Court of Arkansas merely construed the city ordinances and decided the case without reference to any Federal question. The opinion of the state Supreme Court (Record, p. 30) does not mention a Federal question. Plaintiff in error filed a motion for rehearing (Record, pp. 33-8.) From this motion it is apparent that plaintiff in error objected to the judgment of the Supreme Court solely upon the ground that the court had construed the ordinances of the city of Little Rock to include the telegraph poles erected on the railway right-of-way within the city limits. The Supreme Court denied the motion for rehearing without opinion. This court has many times held that a judgment of a state court can not be re-examined in the Supreme Court of the United States simply because a Federal question was presented to the state court for determination. The state court must decide the Federal question or its decision must have been necessary to the judgment rendered in the case.

Israel v. Arthur, 152 U. S. 355; 38 L. E. 474.

Murdock v. Memphis, 87 U. S. 590; 27 L. E. 429.

"To give us jurisdiction of a writ of error for the review of a judgment of a state court, it must appear

affirmatively, not only that a Federal question was raised and presented for decision to the highest court of the state having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. The cases to this effect are numerous."

Adams County v. Burlington M. R. R. R. Co., 112 U. S. 123-9; 28 L. E. 678.

Chouteau v. Gibson, 111 U. S. 200; 28 L. E. 400.

Ark. So. R. R. Co. v. German Nat. Bank, 207 U. S. 275; 52 L. E. 204.

Mutual Life Ins. Co. v. McGrew, note; 63 L. R. A. 42.

The decision of the Arkansas Supreme Court construing the ordinances of the city of Little Rock is conclusive upon this court. Something more than a mere possible misconstruction of a state statute or municipal ordinance by the highest court of a state is necessary to present a Federal question which will sustain a writ of error from the Federal Supreme Court.

Seattle R. & S. R. Co. v. Washington *ex rel.* Linhoff, 231 U. S. 568; 58 L. E. 372.

Reinman v. Little Rock, 237 U. S. 171; 59 L. E. 900.

This court has held so many times that the Post Road Acts of Congress are merely permissive and do not relieve the telegraph companies from reasonable state and municipal regulation, that this question is not open to further argument, being plainly foreclosed by the numerous decisions of this court.

Western Union Teleg. Co. v. Massachusetts, 125 U. S. 530; 31 L. E. 790.

Western Union Teleg. Co. v. Richmond, 224 U. S. 160; 56 L. E. 710.

City of St. Louis v. Western Union Teleg. Co., 148 U. S. 100-102; 37 L. E. 384.

Western Union Teleg. Co. v. New Hope, 187 U. S. 419; 47 L. E. 240.

City of Toledo v. Western Union, 107 Fed. 10.

Ganz *et al.* v. Ohio Postal Teleg. Co., 140 Fed. 692.

Postal Teleg. & Cable Co. v. Baltimore, 24 L. R. A. 161.

Mackay Teleg. & Cable Co. v. City of Texarkana, 199 Fed. 347.

Mich. Teleg. Co. v. City of Charlotte *et al.*, 93 Fed. 11.

37 Cyc. 1622-1625.

The questions on which the decision of this cause depends are so frivolous, and it is so apparent that the appeal was taken for delay only, that we deem an extended argument or a lengthy citation of cases unnecessary.

We respectfully submit that the appeal in this case should be dismissed for want of jurisdiction, and since it is apparent that the appeal was taken merely for delay, ten per cent damages should be awarded upon the amount of judgment as provided for in Rule 23.

Respectfully submitted,

JAMES W. MEHAFFY,
Counsel for Defendant in Error.